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**THE
PENNSYLVANIA
CORPORATION REPORTER**

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Containing

**OPINIONS, GENERAL ORDERS, ADMINISTRATIVE RULINGS, REPORTS,
CIRCULARS, RULES OF PRACTICE, ETC., OF**

**THE PUBLIC SERVICE COMMISSION
OF PENNSYLVANIA**

And

**OPINIONS OF THE COUNTY COURTS THROUGHOUT THE COMMON-
WEALTH AND OF THE ATTORNEY GENERAL INVOLVING THE LAW
OF PRIVATE CORPORATIONS, INCLUDING CORPORATION
TAX CASES AND APPEALS FROM THE
PUBLIC SERVICE COMMISSION**

Reported and Edited by
KARL E. RICHARDS
Of the Dauphin County Bar

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Volume VII

JANUARY 1919—JULY 1919

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HARRISBURG, PA.**

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- Glen Rock Motor Club v. York & Maryland Line Turnpike Co., 3 P. C. R. 350. Order modified and affirmed 64 Super. 147; 4 P. C. R. 205.
- Haile v. The Shamokin Brewing Co., 1 P. C. R. 241. Affirmed sub nom. Pramuk's Appeal, 250 Pa. 45.
- Leiper v. Baltimore & Philadelphia Railroad Co., 5 P. C. R. 178. Reversed, 262 Pa. 328; 7 P. C. R. 218.
- Lutz v. Webster, 2 P. C. R. 349. Affirmed 249 Pa. 226.
- Lycoming Edison Co., Application of, 4 P. C. R. 379. Affirmed 67 Super. 608; 5 P. C. R. 193.
- McCrary Bros. Co. v. P. & L. E. R. R. Co. et al., 4 P. C. R. 124. Reversed 66 Super. 307; 4 P. C. R. 627.
- McDowell v. North Side Bridge Co., 2 P. C. R. 216. Reversed 247 Pa. 190.
- Miller v. Metropolitan Life Ins. Co., 1 P. C. R. 254. Appeal quashed 58 Super. 464.
- Mountain Gas Co., Application of. Affirmed 70 Super. 308; 6 P. C. R. 537.

- Mt. Union, Borough of, v. Mt. Union Water Co., 2 P. C. R. 698 and 3 P. C. R. 180. Affirmed by Superior Court, 63 Super. 337; 4 P. C. R. 210. Affirmed by Supreme Court, 256 Pa. 516; 4 P. C. R. 457.
- National Tube Co. v. B. & O. R. R. Co., 4 P. C. R. 587. Reversed 68 Super. 503; 5 P. C. R. 463.
- Neighborhood Club v. Pennsylvania Railroad, 5 P. C. R. 289. Reversed 69 Super. 404; 6 P. C. R. 177.
- New Castle Electric Co. v. Harmony Electric Co., 3 P. C. R. 552. Affirmed 70 Super. 20.
- New Castle Electric Co. v. Public Service Commission et al. Affirmed 70 Super. 20; 7 P. C. R. 9.
- Order of Ry. Conductors et al. v. B. & O. R. R. Co., 4 P. C. R. 56. Reversed 65 Super. 531; 4 P. C. R. 616. Decision of Superior Court reversed and Order of the Public Service Commission reinstated, 260 Pa. 323; 6 P. C. R. 57.
- Order of Ry. Conductors et al. v. C. R. R. of N. J., 4 P. C. R. 58. Reversed 65 Super. 536; 4 P. C. R. 616. Decision of Superior Court reversed and Order of Public Service Commission reinstated, 260 Pa. 328; 6 P. C. R. 60.
- Order of Ry. Conductors et al. v. P. R. R. Co., 4 P. C. R. 50. Affirmed 67 Super. 569; 5 P. C. R. 200.
- Order of Ry. Conductors et al. v. P. R. R. Co., 4 P. C. R. 53. Affirmed 67 Super. 575; 5 P. C. R. 205.
- Order of Ry. Conductors et al. v. P. & R. Ry. Co., 4 P. C. R. 60. Reversed 65 Super. 536; 4 P. C. R. 616. Decision of the Superior Court reversed and Order of the Public Service Commission reinstated, 260 Pa. 327; 6 P. C. R. 60.
- Pennsylvania Power Co. v. Public Service Commission et al. Affirmed 70 Super. 24; 7 P. C. R. 12.
- Pennsylvania Power Co. v. Public Service Commission, 5 P. C. R. 165. Affirmed 261 Pa. 211.
- Pennsylvania R. R. Co. v. Public Service Commission (and Kift Milling Co.), 3 P. C. R. 141. Reversed 64 Super. 586; 4 P. C. R. 227.
- Pennsylvania State Camp, P. O. of A.'s Application, 4 P. C. R. 293. Affirmed 261 Pa. 184.
- Pennsylvania Utilities Co. v. Lehigh Navigation Elec. Co., 2 P. C. R. 422. Affirmed 254 Pa. 289.
- Pennsylvania Utilities Co. v. Lehigh Navigation Elec. Co., 4 P. C. R. 485. Affirmed 69 Super. 612; 7 P. C. R. 1.
- Perry County Telephone & Telegraph Co., Application of, 4 P. C. R. 387. Affirmed by Superior Court, 69 Super. 529; Affirmed by Supreme Court, 7 P. C. R. 509.
- Phila. & Gulf Steamship Co. v. Pechin, 1 P. C. R. 288. Affirmed 61 Super. 401.
- Pittsburgh, City of, v. Pittsburgh Rys. Co., 4 P. C. R. 249. Affirmed 66 Super. 243; 4 P. C. R. 620.

- Schmitt v. Potter Title & Trust Co., 2 P. C. R. 755. Affirmed 61 Super. 301.
Schuylkill Light, Heat & Power Co., Petition of, 1 P. C. R. 122. Affirmed
69 Pa. Super. 400; 7 P. C. R. 141.
- Scott v. Huston et al., 1 P. C. R. 232. Affirmed 247 Pa. 12.
- Sinking Spring Water Co. v. Gring, 4 P. C. R. 215 and 320. Appeal quashed
257 Pa. 340.
- Somerset Dairy Co-Operation et al. v. B. & O. R. R. Co. et al., 3 P. C. R.
483. Reversed 66 Super. 403; 5 P. C. R. 1.
- Stratford v Franklin Paper Mills Co., 3 P. C. R. 604. Reversed 257 Pa.
163.
- Strayhorn et al. v. P. & R. Ry. Co., 3 P. C. R. 21. Affirmed 67 Super. 604;
5 P. C. R. 208.
- Tanner, Receiver, v. O. M. Weber Co., Inc., 2 P. C. R. 167. Affirmed 59
Super. 14.
- West Virginia Pulp & Paper Co. et al. v. P. R. R. Co. et al., 2 P. C. R. 673.
Affirmed 65 Super. 5; 4 P. C. R. 225.
- White v. First National Bank of Pittsburgh, 2 P. C. R. 748. Affirmed 252
Pa. 205.
- Wilkes-Barre Co., Application of, 5 P. C. R. 232. Affirmed 70 Super. 464;
7 P. C. R. 514.

THE PENNSYLVANIA CORPORATION REPORTER

VOLUME SEVEN

SUPERIOR COURT

PENNSYLVANIA UTILITIES COMPANY, APPELLANT, *v.* PUBLIC
SERVICE COMMISSION, APPELLEE, AND LEHIGH NAVIGATION
ELECTRIC COMPANY, INTERVENING APPELLEE.

*Public service companies—Merger—Company chartered prior to
January 1, 1914—Certificate of public convenience—"Pro-
posed public service companies"—Act of July 26, 1913, P. L.
1374, Art. III, Sec. 2 (b)—Right of appellant to take appeal
—Jurisdiction of Commission.*

An electric company which by merger dated January 6, 1913, acquired the right to serve the public in a certain township, and which in good faith constructed a power plant adequate to serve the public throughout the entire district covered by its charter, but which had not prior to January 1, 1914, actually built transmission lines nor rendered any service to the public in said township, was a public service company prior to January 1, 1914, and not a "proposed public service company" within the meaning of Article III, Section 2 (b) of the Public Service Company Law, which requires the approval of the Commission before such proposed company may begin the exercise of its rights, privileges, and franchises.

The appellant, being a party to the proceedings before the Commission, and being affected by said order, has a legal right to take an appeal.

The Commission has no power to declare a charter void, it being the exclusive function of the attorney general to institute the necessary proceedings for that purpose.

In the Superior Court of Pennsylvania. No. 5, March Term, 1918. Appeal from the order of the Public Service Commission in Pennsylvania Utilities Company v. Lehigh Navigation Electric Company. Complaint Docket No. 1147. Affirmed. (For Report and Order of the Commission, see 4 P. C. R. 485.)

John E. Fox and *John R. Geyer*, for appellant.

Berne H. Evans, for appellee.

Howard A. Lehman, *J. E. B. Cunningham* and *Wm. Jay Turner*, for intervening appellee.

KEPHART, J., July 10, 1918:

The question presented by this and a number of other appeals now before the court is of considerable importance to utility companies in the Commonwealth. After the decision in the case of *Ely v. White Deer Mt. Water Company*, 197 Pa. 80, there was a great effort by certain utilities to secure charters for the municipal districts they deemed necessary to their present and future plan of development. These concerns found it impossible, because of the great economic waste, to construct separate operating plants in each of the districts for which charters were secured. The legislature had supplied a way by which the charters might be unified and very much the same result obtained as though a charter for more than one district had been permitted. The Purchase Act of 1876 was largely employed. See *Hey v. Springfield Water Co.*, 207 Pa. 38; *Commonwealth v. Water Co.*, 225 Pa. 317; *Greensburg Boro. v. W. Water Co.*, 240 Pa. 485; and a list of authorities there referred to. As a legal consequence the purchase act differs but little from the merger act which is used to some extent to consolidate companies. This act is now under consideration.

The Lehigh Navigation Electric Company, hereafter termed Lehigh company, was created under the merger act by a large number of electric companies authorized to supply light, heat and power to various townships in Carbon, Northampton and other counties. The Beechwood Electric Company, chartered April 4, 1911, to supply Palmer Township, Northampton County, was one

of these companies. The merger took place January 6, 1913. Prior thereto, one of the merged companies had erected one of the largest electrical generating stations in the state and had begun to construct a transmission system. After the merger, prosecution of this work was vigorously proceeded with prior to and since the first of January, 1914, the effective date of the Public Service Law. Neither the Beechwood company, nor the new Lehigh company, had done any physical work in Palmer Township. In August, 1916, the Lehigh company attempted to construct its facilities in this township to serve customers who had demanded service. The Pennsylvania Utilities Company, similarly formed by the merger of a number of other companies, and supplying current in Palmer Township, filed a complaint with the Commission. An order having been made adverse to the complainant, the Pennsylvania company appeals.

The right of the appellant as a party aggrieved or affected to take this appeal is challenged. The Pennsylvania company appeared before the Commission as a complainant; that body received its protest, directed hearings on account of it, and on the evidence submitted for and against the charge made in the complaint made its order. A protestant's right is ordinarily fixed by the action of the Commission. It recognized the complainant as having a sufficient property interest in law to be heard. After such action this court will not now deny to the complainant the right to be heard on appeal. Following the thought expressed in *Citizens Elec. I. Company v. Lackawanna & W. V. P. Company*, 255 Pa. 145-155, if the Lehigh Company was without legal authority in attempting to invade Palmer Township and was doing an illegal act, the appellant, having a legal right and doing business there, could protest. As to any company attempting an illegal act, the Pennsylvania company had an exclusive franchise. It was a party affected by the order.

It is the theory of the appellant that inasmuch as the consolidated company had not done any business or physical work in Palmer Township prior to the effective date of the Public Service Act, that as to such municipal district the Lehigh company was a proposed public service company required by the act to secure a certificate. Section 2 of Article III of the Public Service Act provides, "Upon the approval of the Commission evidenced by its

certificate of public convenience, first had and obtained, and not otherwise, it shall be lawful for any proposed public service company—(a) To be incorporated, organized, or created. * * * (b) To begin the exercise of any right, power, franchise, or privilege under any ordinance, municipal contract, or otherwise.” It is further urged that inasmuch as the consolidated company and the Beechwood company had not within two years from the date of letters patent proceeded in good faith to carry on its work and construct or acquire its necessary buildings in Palmer Township, the charter rights and privileges reverted to the State and it was without corporate capacity. It will be observed that the merger was within two years of the date of the letters patent of the Beechwood company and prior to the effective date of the Public Service Act. Our first inquiry must be as to the effect of the merger. There is no constitutional inhibition against merger and the legislature is committed to the policy of permitting corporations to merge and consolidate: *Hey v. Springfield Water Co.*, supra, where the Purchase Act of 1876 was under consideration. After merger the status, if they have any, of corporations which form the merger, and the effect of acts done or omitted, as they relate to these constituent companies, or the new company, are entirely questions of legislative intention. The Merger Act of 1909, P. L. 408, provides: “Section 1 * * * It shall be lawful for any corporation * * * to merge its corporate rights, franchises, powers, and privileges with and into those of any other corporation or corporations transacting the same or a similar line of business, so that by virtue of this act such corporations may consolidate, and so that all the property, rights, franchises, and privileges then by law vested in either of such corporations, so merged, shall be transferred to and vested in the corporation into which such merger shall be made.” Then follow certain exceptions not material. Section 2 regulates the procedure under which the merger takes place, requiring that there shall be an agreement which shall set forth the name of the new corporation, the names of directors and other officers, the number of shares of stock and par value, and the manner of converting the stock of each of said corporations into the stock of the new corporation. “Section 3 * * * Upon the issuing of new letters patent thereon by the governor, the said merger shall be

deemed to have taken place, and the said corporations to be one corporation under the name adopted * * * possessing all the rights, privileges and franchises theretofore vested in each of them, and all the estate and property, real and personal * * * all rights of creditors and all liens upon the property of each of said corporations shall continue unimpaired, and the respective constituent corporations may be deemed to be in existence to preserve the same; and all debts, duties and liabilities of each of said constituent corporations * * * may be enforced against it. * * * But such merger * * * shall not be complete * * * until it shall have first obtained from the governor * * * new letters patent." It is clear the ultimate effect of this act is to provide a method of incorporation, and, as individuals are associated to form a corporate entity, so two or more corporations may be associated to form a single corporate entity. Upon consolidation thereunder the constituent companies are deemed dissolved and their powers and faculties to the extent authorized are vested in the merged company as a new corporation. It is an entity entirely distinct from its constituent's. It draws its life from the act of consolidation. The fact that to ascertain the powers and faculties of the new company you must be referred to what existed in the old companies does not affect this result: *Railroad Co. v. Georgia*, 98 U. S. 359-362; *Pullman Co. v. Missouri Pacific Co.*, 115 U. S. 587-594; 7 R. C. L., Sections 144, 145, 146, 147, and the many authorities there cited. It is not necessary to follow each constituent unit in determining questions which affect the powers and faculties common to all of the several units and which are now exercised by the new concern as its powers for the entire field regardless of the heretofore existing district distinction. The grant of future privileges in certain places, contracts entered into and all forms of corporate enterprise within the scope of the general corporate authority are referable to the consolidated powers as they exist in the new company. Acts done by the new concern, although outside of the place for which one of the old companies was incorporated, are regarded, unless of special application to a particular locality, as being acts done for one company covering many municipal districts as one entire field or district. In the merger of the Lebanon Valley and Reading Railroads, Chief Justice Lowrie states: "This is called a merger of the Lebanon cor-

poration into the other; but such a merger is a dissolution, destroying the actual identity of both, while the legal identity of one of them is preserved": *Lauman v. The Lebanon Valley Railroad Company*, 30 Pa. 42. When questions arise concerning an act done in the field of the new company, which act is associated with powers and faculties peculiar to a part of this field because of the scope of powers as they existed in one of the units before the merger, the legality of such act is determined from a consideration of such specific powers and faculties as they are vested in the new company as the act of the new company, however, not of the old company. There is nothing in the Act of 1909 which keeps the constituent company alive for the purpose of preserving these special powers that the question may be determined. They are kept alive when the new company is vested with the faculties that were "by law vested in either of said corporations." If one of the constituent companies before merger possessed powers and faculties greater than the other members of the proposed consolidation, the merger does not give such members the benefits of the greater faculties: *Kane and E. R. R. Co. v. Pitts. & W. R. R. Co.*, 241 Pa. 608; *Punxsutawney Boro. v. G. & O. Co.*, 238 Pa. 23. If it may be said that the constituent is kept alive, this existence is purely fictional as an aid in determining, through that medium, the special character of the grant possessed or as provided by the merger act to preserve against the old company any rights which creditors might have, but in legal contemplation this is worked out by its successor in right, the new company. "From the time of the completion of said merger the constituent companies cease to exist," they have no legal identity or corporate existence, no action can be maintained against such constituent company after the merger as there is no party upon whom papers can be served: *Delmas v. Ry.*, 254 Pa. 9-15. It is clear then that the Lehigh company was an active, operating company, and as to Palmer Township, was not a proposed company.

In acquiring all the rights and faculties of the constituent companies, they are taken with all their disabilities or limitations, such as may be distinct from the special powers and faculties of a member of the merger. We have considered the faculties as being merged into the new company and extinct so far as the old company was concerned. So would limitations or conditions

common to all the companies be merged into a general limitation or condition applicable to the new company, as it covers the entire field and extinct so far as the constituent was concerned. To hold the limitations applicable to each member in its independent capacity will produce great uncertainty and much discord in the legislative idea and working out of the new company and would in effect leave it but a shell, a mere business alliance in which the identity and distinctive existence of the constituent is preserved. One of the limitations is that if the corporation "shall not proceed in good faith to carry on its work and construct or acquire its necessary buildings, structures, property or improvements, within the space of two years from the date of its letters patent * * * the rights and privileges thereby granted to said corporation shall revert to the Commonwealth": Act of May 16, 1889, P. L. 241. (Whether this could be raised by any one but the attorney general will be considered later.) These constituents were incorporated at different times and if the question here raised is to be referred to the constituent as if the merger had not taken place, the corporate life of the consolidation would be dependent on the date of the letters patent of each constituent and the activity of its officers in beginning business. The consolidation as a new company would have no territory or field within which the merger act could operate. It is difficult to understand how the corporate existence of one of the merged companies could be kept alive to sustain this limitation. Under the act, its powers and faculties had been transferred, its stock is out of existence and it is without officers, without debts, and the sole characteristic to survive in order to answer this question would be this limitation as applied to the particular corporation under consideration. This could not be unless the entire corporate life, the powers, faculties and limitations, all survived. This would be contrary to the great weight of authority. It would nullify the purpose of the merger act which was to unify existing companies and create a new company. In order to safeguard the separate charter rights and privileges of merged companies under a construction here asked for, it would be necessary for each unit to construct independent works in the district covered by each one of the merged companies. It would be an economic waste for such companies to construct transmission lines or works in ad-

vance of its ability to utilize them. It is contrary to the spirit of the public service law, which seeks the minimum cost to reduce rates. The purpose of the merger act was to create a community of interest with maximum economy in production and effective service as a resultant benefit to the public. These limitations and conditions are just as much a part of the corporation as are its faculties and powers and must so be regarded. When the Lehigh company built its transmission lines through other portions of the district and furnished its commodity from its central station in these districts, these acts were in behalf of and on account of all the territory and inured to the benefit of the entire field to the same extent as it did in the locality where the business was actually transacted. It was in exercise of the general functions of the corporation and though no work was done in Palmer Township as such, the Commission having found that the new company in good faith proceeded to carry on its work, it satisfied the requirement of the Act of 1889. If it later develops, through lapse of time or from other cause, that the Lehigh company has failed to meet its charter obligations, the law has provided an ample remedy by which those in authority may correct the evil. This may be done just as completely as though the constituent still existed. We, therefore, hold that the Commission's order was reasonable and in conformity to law when it determined the Lehigh company was one company, that it was in good faith actually exercising its powers and faculties under its charter obligations before January 1, 1914. That it was then doing business in a large part of its territory and was as to the entire field not a proposed public service corporation. Being a corporation actually doing business and desiring to further perform its charter obligations by supplying its commodity to persons resident within its territory, the public service act does not require it to secure a certificate of public convenience. Section 2 of Article III cannot apply to a company actually engaged in the business called for in its charter. Section 18 certainly did not have in contemplation a certificate for each step taken by a company doing business on January 1, 1914, and we can quite easily see a decided difference between such a company and one that had received its letters patent and had totally failed for more than two years after their issuance and before the public service act went into effect to

acquire any property or do anything in performance of its duty to the public. Such concerns now seeking to do business, having no property of any kind and being entirely outside the Act of 1889 present a much different proposition. Such was the case of *Jenkins Township v. Public Service Commission*, 65 Pa. Superior Ct. 122, and *Relief Electric L., H. & P. Co.'s Petition*, 63 Pa. Superior Ct. 1, 3 P. C. R. 443.

One word with respect to the right of the Commission to consider this question. The Commission does not undertake to usurp any function of the attorney general. As we said in the *Jenkins* case, *supra*: "This act (of 1889), was a part of its organic law and was the limitation placed by the State on the grant contained in the letters patent." The Commission does not declare a charter void. They simply decide, if they find a thing without lawful powers or life, not to infuse new life into it. Their action defines their attitude as a Commission toward the enforcement of an act of assembly where a violation of the law is admitted. It still remains for the attorney general to institute the necessary proceedings to declare the charter void. The legislature in the creation of the Commission conferred upon it authority to deal with the powers and faculties of corporations. It may be viewed in much the same light as the question presented in *Homestead St. Ry. v. Railway*, 166 Pa. 162, where conflicting charter rights to a street were determined by a bill for an injunction.

The order of the Commission is affirmed, the costs to be paid by the appellant.

NEW CASTLE ELECTRIC COMPANY, APPELLANT, *v.* PUBLIC SERVICE COMMISSION, APPELLEE, AND HARMONY ELECTRIC COMPANY, INTERVENING APPELLEE.

Public service companies—Merger—Company chartered prior to January 1, 1914—Certificate of public convenience—"Proposed public service companies"—Act of July 26, 1913, P. L. 1374, Art. III, Sec. 2 (b).

See *Pennsylvania Utilities Company v. Public Service Commission*, ante p. 1.

In the Superior Court of Pennsylvania. No. 106, October Term, 1917. Appeal from the order of the Public Service Commission in *New Castle Electric Company v. Harmony Electric Company*. Complaint Docket No. 475. Affirmed. (For Report and Order of the Commission, see 3 P. C. R. 552.)

Douglass D. Storey and Ralph J. Baker, for appellant.

Berne H. Evans, for appellee.

J. Norman Martin and Walter Lyon, for intervening appellee.

KEPHEART, J., July 10, 1918:

The Harmony Electric Company was formed December 30, 1913, by a merger of twenty-six companies, one of which was the Shenango Electric Company, incorporated May 6, 1913, for Shenango Township. The consolidated company, after the merger, proceeded to supply customers in this township from a power station in Jackson Township. The New Castle Electric Company had been serving the public in this township and the City of New Castle for twenty years or more. It had a large investment in its plant and filed a complaint protesting against this move of the Harmony company. It was similar to that filed in the Pennsylvania-Lehigh case just preceding. The Commission found as a fact that the Harmony company, on the 31st of December, 1913, supplied light, heat and power by means of electricity to the public in the several municipalities named in the charters of the companies merged into the Harmony company "and was supplying electric current for power and lighting purposes in Shenango Township." The Commission concluded that it was not necessary for the Harmony Company to secure a certificate which would permit it to do business generally in Shenango Township. They held that the extent of the business engaged in was an effort in good faith on its part to prosecute its work as required by law and that its service, extending over a number of townships, although furnished to but one company, was a service in good faith; and as it was a going concern before the act became effective, a certificate of public convenience was not required. Appellant argues there is no evidence to support this finding. The Harmony company leased, on December 30,

1913, from a street railway company, its large power station in Jackson Township and its transmission lines in this and other townships. These lines were built and being operated by the street car company before this lease was executed. It appeared that the electric company had but one customer, and that was the street railway company, and sold to it a large part of its current. We discussed, in the Pennsylvania-Lehigh case, the effect of the merger act. The conclusions of the Commission in the case now before us are such that any change therein because of a difference of opinion that we might have would be but a substitution of our judgment for that of the Commission's. We can, however, see no logical difference between serving one customer or one hundred customers when all acts are in good faith. As testing the bona fides of the company, under circumstances such as here presented, such an act might be seriously questioned from the standpoint of public policy; that is, an attempt by this means of a street railway company to engage in a lighting and power business.

It is urged, however, that when the Public Service Act was passed (July 26th) the Shenango company had not recorded its charter, and when the charter was recorded the provisions of the law were included therein with the same effect as though it had been secured after January 1, 1914. The reason advanced being that until the charter was recorded it was not a corporate body and the Public Service Act, passed prior to that date, took away from it no right that it possessed and this law must, therefore, be considered part of its charter. The Public Service Act, however, did not become effective until January 1, 1914. It did not affect charters secured subsequent to its passage and prior to January 1, 1914, as it relates to this question. When the company recorded its charter, it could have engaged in the business of supplying electricity in that township without further authority. There was no commission in existence which had power to issue a certificate of public convenience. Before January 1, 1914, it merged into a company covering a larger field and that company, according to the Commission, immediately engaged in business. When the merger was effective, the Shenango company ceased to exist as such. The new corporation succeeded (or supplanted) it, and the question here discussed must be considered under the Public

service law as affecting the new company. We have discussed this in the Pennsylvania-Lehigh case.

The cases referred to by the appellant do not control.

The order of the Commission is affirmed at the cost of the appellant.

PENNSYLVANIA POWER COMPANY, APPELLANT, *v.* PUBLIC SERVICE COMMISSION, APPELLEE, AND HARMONY ELECTRIC COMPANY, INTERVENING APPELLEE.

Public service companies—Merger—Company chartered prior to January 1, 1914—Certificate of public convenience—"Proposed public service companies"—Act of July 26, 1913, P. L. 1374, Art. III, Sec. 2 (b).

See Pennsylvania Utilities Company *v.* Public Service Commission, and New Castle Electric Company *v.* Public Service Commission, ante p. 1, and p. 9.

In the Superior Court of Pennsylvania. No. 105, October Term, 1917. Appeal from the order of the Public Service Commission in Pennsylvania Power Company *v.* Harmony Electric Company. Complaint Docket No. 474. Affirmed. (For Report and Order of the Commission, see 3 P. C. R. 559.)

Douglass D. Storey and Ralph J. Baker, for appellant.

Berne H. Evans, for appellee.

J. Norman Martin and Walter Lyon, for intervening appellee.

KEPHART, J., July 10, 1918:

This appellant was incorporated in 1904 as a water power company. The Wayne Electric Company was incorporated May 26, 1913, and on December 30, 1913, was merged with other companies into the Harmony Electric Company. The Harmony Electric Company made a contract with certain concerns in Wayne Township to supply them with electricity. The Pennsylvania Power Company made complaint to the Public Service Commission similar to that in the preceding cases, which was dismissed. The facts presented are not essentially different from those in the foregoing appeal and for the reasons there given, the order of the Commission is affirmed at the cost of the appellant.

PUBLIC SERVICE COMMISSION.

BOROUGH OF NEWPORT AND W. G. LOY, ET AL., v. NEWPORT HOME WATER COMPANY.

Water companies—Valuation of plant for rate making purposes—Service lines installed at cost of consumers—Property not used or useful—Going concern value—Fair return—Rates.

Service lines of a water company which are paid for by the consumers should not be included in the value of the company's plant for rate making purposes.

Property belonging to a public service company but not used or useful in the furnishing of service to the public, will not be included in a valuation of its plant for rate making purposes.

Where the several items of property of a public service company have been valued as parts of a going business, it is not necessary that a special allowance for "going concern value" be made.

COMPLAINT DOCKET NOS. 499 AND 539.

Report and Order of the Commission.

W. S. Snyder and Hon. James W. Shull, for complainants.

C. B. Müller, J. E. B. Cunningham, and George R. Heisey, for the respondent.

AINY, Chairman:

On October 15, 1915, the Newport Home Water Company, the respondent, filed with this Commission in accordance with the provisions of the Public Service Company Law, a new schedule of rates, being P. S. C. Pa. No. 2, effective December 1, 1915, which superseded its schedule, P. S. C. Pa. No. 1. The new schedule made a material increase in the rates for municipal and domestic service.

On November 29, 1915, the Borough of Newport filed a complaint against the proposed increased municipal rates, alleging that the same were excessive and unreasonable as well as in violation of a contract existing between said complainant and respondent providing for municipal rates.

On February 29, 1916, W. G. Loy and other residents of Newport filed a complaint, alleging that the domestic rates of respondent were excessive and unreasonable. The answer of respondent denies all the material allegations set forth in the complaints.

In view of the recent decision of the Supreme Court in *V. & S. Bottle Company v. Mountain Gas Company*, 261 Pa. 523, and the opinions of this Commission expressed in *Ben Avon, et al., v. Ohio Valley Water Company*, 4 P. C. R. 537, and *City of Oil City v. Petroleum Telephone Company*, 6 P. C. R. 244, we do not deem it necessary to discuss the contract for rates entered into between the respondent and the borough, and we will confine this report to the single issue of the reasonableness of the increased rates.

Newport is a borough situated in Perry County on the west bank of the Juniata river and has a population of about 2,500. Respondent water company was incorporated May 10, 1893, under the Act of April 29, 1874, to serve the public in the Borough of Newport and adjacent territory. Its original capital stock was \$1,000 and was increased on July 11, 1893, to \$30,000, all of which is outstanding. A further increase of \$30,000 authorized later appears, from the evidence, not to have been issued. It also appears that only a small percentage was paid on the stock. In 1893 bonds were issued in the sum of \$30,000, and later additional bonds to the amount of \$46,000 were issued, so that at the present time the outstanding bonds bearing five per cent. amount to \$76,000, and the outstanding stock amounts to \$30,000.

The main source of supply of respondent is a group of springs located across the Juniata river in Howe Township about three miles from Newport. From these springs the water is conducted through an eight-inch main to a distributing reservoir, on the east side of the river, having a capacity of a little over 100,000 gallons, and from this reservoir the water is carried through an eight-inch line underneath the river into the distribution system. During dry seasons this spring supply is not sufficient to meet the demands of the public and the deficiency is made up by pumping and filtering water from the river. The pumping station and filter plant are located on the east bank of the river, the duplicate pumping units being belt driven by gasoline engines.

The raw water pumps are of 250,000 gallons and the main pumping units are triplex pumps of approximately 300,000 gallons daily capacity. Mechanical gravity filters are used. The

distribution system covers practically all the streets of Newport Borough and extends in some instances into the adjacent territory. Fire service is furnished through twenty-eight hydrants with four-inch connections. Service to manufacturing plants and hotels is on a meter basis, twelve meters being in use. All other service is on a flat rate basis.

An engineering conference was agreed upon by the parties and after an exhaustive investigation a report was made and offered in evidence, wherein it is shown that the reproduction cost new of all of respondent's used and useful property, based on average prices prevailing for a five-year period prior to 1916, less a proper depreciation allowance, was agreed upon as being \$51,538.

The engineer for respondent, however, contended that certain property which is neither used nor useful at the present time, consisting of experimental wells, abandoned pumping station, etc., as well as a further item designated as cost of developing respondent's business, should be included in the total. With these items added the reproduction cost new less depreciation of respondent's plant would be \$65,588.

The following is a comparative statement of the reproduction cost new less depreciation of respondent's property as shown by the report of the engineers' conference, and as contended for by the engineer for the respondent. (See p. 16.)

The accounts of respondent were audited by complainants and respondent, as well as by the Bureau of Accounts and Statistics of the Commission. The joint report of the auditors for complainants and respondent indicates that the original cost of respondent's plant was \$82,516.96. This was afterwards changed by a supplemental report made by the auditor for complainants to \$52,516.96, in which the auditor for respondent did not concur, the difference being due to an item of \$30,000 for stock of the company issued for that amount without consideration. The original cost of the respondent's plant as reported by the Bureau of Accounts and Statistics of the Commission is \$51,624.40. The following is a comparative statement of the original cost of respondent's plant as reported by the Bureau of Accounts and by the auditors for complainants and respondent. (See p. 18.)

The following is a statement of income, operating expenses, interest and dividends paid, etc., of respondent company from 1910 to 1915 inclusive (See p. 20):

NEWPORT HOME WATER COMPANY COMPARATIVE STATEMENT OF REPRODUCTION COST ESTIMATES.

	Amounts as Estimated by Engineer for Respondent.	Amounts as Estimated by Engineer for Complainant.				
	Reproduction Cost New (1).	Depreciation (2).	Reproduction Cost New (3).	Depreciation (4).	Depreciation (5).	Reproduction Cost New (6).
1. Supply lines,	\$13,589	\$4,873	\$13,556	\$13,556	\$4,873	\$13,556
2. Distribution system,	15,351	3,809	11,542	15,351	3,809	11,542
3. Fire hydrants,	1,150	512	638	1,150	512	638
4. Distribution reservoir,	1,714	243	1,471	1,714	243	1,471
5. Meters in use,	823	81	742	823	81	742
6. Buildings,	283	35	248	283	35	248
7. Filter house and equipment,	6,004	1,234	4,770	6,004	1,234	4,770
7a. Contingencies (5 per cent. on items 1 to 7, inclusive)	2,191	519	1,672	2,191	519	1,672
7b. Contractor's profit (10 per cent. on items 1 to 7a inclusive),	4,601	1,000	3,601	4,601	1,000	3,601
8. Real estate,	3,856		3,856	3,856		3,856
8a. Engineering (7 1/2 per cent. on items 1 to 8 inclusive),	3,913	733	3,179	3,913	733	3,179
9. General equipment,	570	88	482	570	88	482
10. Material and supplies,	695		695	695		695
11. Motors on hand,	580		580	580		580
12. Office furniture, fixtures and supplies,	254	64	190	254	64	190
13. Organization and administration—						
13a. Legal expenses,	850		850	850		850
13b. Incorporation,	150		150	150		150
13c. Promoters' services,	500		500	500		500
13d. Administration during construction,	900		900	900		900
14. Interest during construction,	1,317	256	1,061	1,317	256	1,061
15. Working capital,	1,000		1,000	1,000		1,000
Total of engineers' agreement,	\$64,665	\$13,127	\$51,538	\$64,665	\$13,127	\$51,538
16. Service lines,						
17. Cost of property not used or useful add as part of the cost of development wells,	1,873	243	1,630			
First pumping station,	1,240		1,240			
Impounding reservoir,	2,500		2,500			
Cost of development,	3,190		3,190			
Total reproduction cost,	\$79,058	\$13,470	\$65,588	\$64,665	\$13,127	\$51,538

*The total reproduction cost new less depreciation as testified to by the engineer for the respondent is \$63,603. The items given as making up this

The reproduction cost of the several items of respondent's property used and useful is agreed upon by the engineers, and we see nothing therein objectionable.

The item of service lines contended for by the respondent's engineer was paid for by the patrons. This Commission in the case of *Greensburg v. Westmoreland Water Company*, P. U. R. 1917 D., page 478 [see 5. P. C. R. 117 and 375], held that an item of this kind should not be included in arriving at a rate base. The items of wells, pumping station and reservoir not being used and useful, cannot be allowed.

Going concern value for which the respondent's engineer claims \$8,190 under the head of cost of development is a proper element of value to be considered by the Commission as indicated by the Supreme Court in its opinion in *Ben Avon, et al., v. Ohio Valley Water Company*, 6 P. C. R. 60. In commenting on this subject the Supreme Court said [6 P. C. R. 72]:

"The mere physical value of such a plant considered apart from the fact that it is a going concern would be only its scrap value so that when a proper allowance is made for the value of the physical property from an investment standpoint with the business attached that going concern value is necessarily included within that estimate."

The Commission is not required to ascertain the value of this item separately, but to consider the several elements of property as "clothed with all the attributes of an established business" thereby giving due weight to the cost of developing the business, past deficits if any have occurred and any other facts which will aid the Commission in reaching its conclusion as to the fair value of the entire property with its business attached and rendering the public service in the manner shown by the testimony. In arriving at the fair value of the property of the respondent we have considered the same as a going concern whose business has been acquired to the extent and in the manner shown by the testimony, and due allowance has been made for this element of value.

Respondent has outstanding \$76,000 in bonds and \$30,000 of stock, making a total of \$106,000. No testimony was presented as to the market value of these securities and therefore they afforded no assistance in determining the fair value.

NEWPORT HOME WATER COMPANY

COMPARATIVE STATEMENT OF ORIGINAL COST OF REAL ESTATE, PLANT AND EQUIPMENT.

	Original Cost of Real Estate, Plant and Equipment, as Reported by the Bureau of Accounts, Exh. No. 2.		Original Cost of Real Estate, Plant and Equipment as Reported in the Joint Report of the Accountant for the Complainants and the Accountant for the Respondent. Exhibit No. 3.		Original Cost of Real Estate, Plant and Equipment as Reported by Supplemental Report of the Accountant for the Complainants, in which the Accountant for the Respondent did not Concur. Exhibit No. 3.	
	Original Cost May 10, 1898, to Dec. 31, 1900.	Original Cost Jan. 1, 1901, to Dec. 31, 1915.	Total Original Cost.	Original Cost May 10, 1898, to Dec. 31, 1900.	Original Cost Jan. 1, 1901, to Dec. 31, 1915.	Total Original Cost.
1. Real estate and right of way,	\$1,174 75	\$947 50	\$1,822 25	\$1,200 00	\$937 50	\$1,797 50
2. Reservoir,	11,411 29	900 94	12,312 23	.....	570 59	570 59
3. Wells and suction, .....	.....	1,871 63	1,871 63	.....	1,847 51	1,847 51
4. Pumping station and filter plant, .....	.....	7,123 59	7,123 59	.....	8,644 97	8,644 97
5. Pipe lines,	20,504 57	6,479 87	26,983 96	.....	6,921 72	6,921 72
6. Meters, .....	.....	535 80	535 80	.....	1,789 62	1,789 62
7. Service lines, .....	.....	590 38	590 38	.....	413 81	413 81
8. Storehouse, .....	.....	227 51	227 51	.....	.....	.....
9. Office furniture and fixtures,	50 00	44 84	94 84	.....	60 84	60 84
10. Engineering,	12 00	12 00	24 00	.....	.....	.....
11. Legal expenses,	50 00	.....	50 00	.....	.....	.....
12. Material and supplies, .....	.....	.....	.....	.....	699 46	699 46
13. Undistributed charges, credits and adjustments, .....	.....	.....	.....	.....	.....	.....
14. Construction accounts, May 10, 1898, to December 31, 1900, not distributed, .....	.....	.....	.....	.....	450 06	450 06
Total original cost,	\$33,302 61	\$18,421 79	\$51,624 40	\$51,421 00	\$21,095 96	\$52,516 96

Complainants contend for a fair value of \$46,131. The respondent contends for a seven per cent. return on a reproduction cost of \$51,538, plus a seven per cent. return on contributed property valued at \$2,471.35, plus amortization allowances of five per cent. on \$6,619 of unearned depreciation and on \$5,612 of unused property. The original cost of respondent's plant was ascertained to be approximately \$52,000 and the cost of reproduction new less accrued depreciation of the used property was agreed upon as \$51,538. Giving due consideration to all the factors presented, we are of the opinion that the fair value of respondent's property, used and useful in rendering public service, and considered as a going concern, is \$51,538.

The complainant contends that the annual operating expenses of respondent should not exceed \$1,654, while the respondent asks that it be allowed \$3,016. The Commission has considered the claims of the parties and the evidence in support thereof and has determined that the sum of \$2,625 is a proper amount to be allowed respondent as its annual operating expense, and that it should be allowed an annual depreciation of \$800, making a total of \$3,425 as a gross amount to be allowed for operating expenses and depreciation.

The Commission is of the opinion that the respondent should receive a return on its fair value as determined by the Commission at the rate of seven (7) per cent., amounting to \$3,607.66 per annum.

Having determined that the fair value of respondent's property is \$51,538 and that the cost of operating including depreciation is \$3,425, and having fixed the rate of return at seven (7) per cent., it will require an annual revenue of \$7,032.66 to meet the cost of the service.

The respondent will be directed to prepare and file with the Commission for its approval, within thirty (30) days, a schedule of rates, together with necessary supporting data, which will return to it annually the sum of \$7,032.66.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and

EXHIBIT NO. 2

NEWPORT HOME WATER COMPANY

STATEMENT OF INCOME ANNUALLY FOR THE YEAR ENDING DECEMBER 31, FROM JANUARY 1, 1910, TO DECEMBER 31, 1915.

	1910	1911	1912	1913	1914	1915
Operating revenue,	\$6,553 79	\$6,568 71	\$6,725 06	\$6,964 85	\$7,185 28	\$7,102 02
Operating expenses—						
Pumping and filtration expense,	594 97	541 98	480 20	789 10	710 88	13 57
Repairs,	180 84	174 17	185 24	61 00	83 64	237 47
Salaries, .....	.....	.....	80 00	1,080 00	210 00	1,350 00
Stationery, printing and postage,	21 75	19 25	39 20	71 90	77 54	95 88
Legal expense,	10 00	35 00	.....	40 00	.....	270 00
Engineering expense,	37 44	17 98	14 00	5 59	117 45	58 25
Taxes,	289 88	289 88	289 26	359 70	249 44	318 90
General expense,	109 53	135 55	100 51	274 26	124 88	243 98
Depreciation, .....	.....	.....	.....	.....	.....	10,000 00
Total operating expenses,	\$1,214 37	\$1,280 78	\$1,185 61	\$3,282 26	\$1,738 78	\$12,708 76
Operating income,	5,341 42	5,287 93	5,540 05	3,782 60	5,446 50	*5,064 74
Nonoperating revenue, .....	.....	.....	.....	.....	71 87	68 15
Gross income,	5,341 42	5,287 93	5,540 05	3,782 60	5,518 37	*5,132 89
Interest,	2,545 00	2,480 08	2,500 00	2,702 29	2,583 00	2,775 75
Net income,	1,796 42	1,807 85	1,860 06	1,080 31	1,935 37	*2,357 14
Dividends, .....	.....	.....	.....	.....	*3,000 00	.....
Surplus,	\$1,796 42	\$1,807 85	\$1,860 06	\$1,080 31	.....	.....
Deficit, .....	.....	.....	.....	.....	\$1,801 63	\$9,573 31

*Deficit.

a full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, September 17, 1918, the Newport Home Water Company, is ordered to prepare and file with the Commission for its approval, within thirty (30) days from the date of service of this order, a new schedule of rates together with necessary supporting data, which will return to it annually the sum of \$7,032.66, being the annual revenue allowed by this Commission, as more fully set forth in the above mentioned report of the Commission.

By the Commission,

WM. D. B. AINEY, *Chairman.*

J. R. GEORGE v. THE PENNSYLVANIA RAILROAD COMPANY, ET AL.

Station facilities at Beaverdale, Cambria County, Pa.—Passenger, freight and express service.

COMPLAINT DOCKET NO. 1224.

W. L. Hicks, for complainant.

Henry W. Storey, for respondent.

ALCORN, Commissioner:

The Pennsylvania Railroad Company has a nonagency station at Beaverdale, Cambria County. At Lloydell, in the same county, situate 2,500 feet south of Beaverdale, there is an agency station and an express office.

The complainant, a resident of Beaverdale, desires that the railroad company be compelled to establish an agency station at Beaverdale and the Adams Express Company an office or place an agent there. At present the railroad company delivers only carload lots at Beaverdale. Express packages or freight in less than carload lots go to Lloydell station and a resident of Beaverdale must travel the 2,500 feet to secure such freight or express packages.

The railroad at Beaverdale is known as the Beaver Branch and is 7.8 miles long, terminating its passenger service at Lloydell station. The two towns or villages are mining towns. Lloydell is the older, but Beaverdale, owing to the opening of new mines, has become the more populous and there is more business at Beaverdale at the present time. In fact the residents of Lloydell conduct their business largely at Beaverdale. The two towns form one community. The railroad company established the station at Lloydell before the one at Beaverdale. The developments and growth appear to be in the direction of Beaverdale and the station there does not afford proper accommodations for the increased population and the growing business. It is claimed that ninety or ninety-five per cent. of the freight and express business which goes to Lloydell station is for the inhabitants of Beaverdale. Neither of the stations affords proper facilities and they are so located as to cause too frequent crossings of the railroad at grade. There is not, however, sufficient business at Beaverdale and Lloydell to require the railroad company to establish at both these places an agency station and an express office. It would not be proper to require two such stations within half a mile of each other as the present stations now are. It would better serve the community if a new and more commodious station should be substituted for the two old ones, having due regard in its location to the population and business of Beaverdale.

The Commission cannot order the railroad company to discontinue the agency at Lloydell and it would not seem at the present time proper to compel the railroad company to establish at Beaverdale an agency station and an express office. Owing to the abnormal conditions now existing it has become necessary to relieve the railroads as much as possible so that transportation necessary for carrying on the war may not be hampered.

The Commission is of the opinion that this complaint should be dismissed and an order will be made accordingly.

ORDER.

This matter being before the Commission on complaint and answer on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made

and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, July 29, 1918, it is ordered: That the complaint in this case be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

BOROUGH OF WYOMISSING, ET AL., v. WEST READING WATER COMPANY.

Rates—Water companies—Alleged to be excessive — Municipal contract—Service inadequate.

The complaints in this case alleged that the proposed new rates of the respondent, effective September 1, 1917, were unjust, unreasonable, excessive, and not warranted by the character of the service rendered. Particular stress was laid upon the rates proposed for fire protection, on the ground that they were in violation of contracts duly entered into and approved by the Public Service Commission. The respondent denied generally the allegations of the complaints and averred that the rates were just, reasonable and calculated to produce only a revenue commensurate with the service.

Upon evidence submitted the Commission fixed the value of the property of the respondent, used and useful in the service rendered, at \$75,000, and estimated the total cost of the service at \$14,950, as follows: seven per cent. return on \$75,000 valuation, \$5,250; operating expenses, \$8,100; depreciation, \$1,600. The new rates were calculated to produce an annual revenue of \$15,404.

It appeared, from evidence submitted and from the records of the Commission, that certain contracts between the respondent company and the Boroughs of West Reading and Wyomissing, providing rates for fire protection, were approved by the Commission on September 8, 1915, and June 14, 1916, respectively, which cover service for that purpose for term ending March 31, 1920.

The Commission held, that under the evidence of the case no sufficient reason was shown for striking down contract rates so recently approved, and the complaints were sustained as to rates for fire protection.

The rates for general service were held not to be unreasonable and the complaints relating thereto were dismissed.

COMPLAINT DOCKET NOS. 1645, 1655, 1661, 1662.

Report and Order of the Commission.

J. Fred Hartegen, J. B. Mercer, J. B. Stevens, and Wm. A. Whitman, Jr., for the complainants.

C. H. Ruhl and E. C. Schaeffer, for the respondents.

AINEY, Chairman:

The complaining consumers are residents of the Boroughs of Wyomissing and West Reading and allege that the increased rates contained in respondent's tariff P. S. C. Pa. No. 4, effective September 1, 1917, are unjust, unreasonable, and excessive, and not warranted by the character of the service rendered. Their complaints further allege that the increased rates for fire protection service are unreasonable and excessive, that the supply is inadequate, and the pressure insufficient, and that the number and location of hydrants is such that the protection afforded is of no value.

The complaining boroughs allege that the charges of \$12.00 per year per hydrant and \$200.00 per year per mile of main, as set forth in respondent's tariff P. S. C. Pa. No. 4, are in direct violation of existing contracts approved by this Commission, and are excessive and unreasonable and unwarranted in view of the character of the service rendered.

With respect to the rates for general service, the respondent avers that the rates formerly in effect were totally inadequate and that the rates against which complaint is directed are calculated to produce a just and reasonable gross income, and that the facilities and service are commensurate with the community supplied. In its answer to the complaints of the boroughs the respondent admits the general averments of the complaints but denies that the new rates are in violation of contract, and denies that they are excessive, unwarranted, and without legal authority, and avers that the prior rates were totally inadequate and that the new rates are calculated to produce a revenue commensurate with the cost of the service.

The four cases were listed for hearing and testimony was taken at Reading on October 4, 1917. The burden of proof rested

upon the respondent and evidence was offered as to the financial history of the company, its investments, its operating revenues and expenses, and the cost of reproducing its property. The complainants did not offer any testimony at this hearing and were afforded opportunity to examine the books and accounts of the respondent company, with particular reference to the testimony offered at the hearing. No further hearing was requested by the complainants and the case was submitted to the Commission upon the filing of briefs, the parties in interest waiving oral argument.

GENERAL DESCRIPTION OF SYSTEM.

The respondent company supplies water in the Borough of West Reading and in the portion of the Borough of Wyomissing lying east of Trent avenue and Bern road. The population served is approximately 4,000 and the total number of consumers is 838. There are twenty-one public fire hydrants in West Reading and four in Wyomissing. The supply is taken from the Schuylkill river and is used principally for domestic consumption, only about ten per cent. being used for industrial purposes. The pumping and filtration plant is equipped with electrically driven units in duplicate. The capacity of the filters and pumping plant is 500,000 gallons per twenty-four hours, without allowance for the capacity of the duplicate equipment. Energy for operating the pumps is purchased from the local electric utility. The distribution system contains practically thirty per cent. of six-inch pipe and sixty per cent. of four-inch pipe. Two standpipes twenty feet in diameter and seventy feet high, having a combined capacity of 329,000 gallons act as equalizers on the system.

GENERAL FINANCIAL HISTORY.

The respondent began operations in 1886 and has been under practically the same control since that time. The financial development of that company is set forth in the accompanying table. The total par value of the stock outstanding at the time the case was submitted to the Commission was \$75,000, of which amount \$46,000 was paid in cash and \$29,000 was the result of reinvestment of earnings, subsequently declared as stock dividends. The

cash dividends paid since the beginning of operations total \$25,060, although there is a little uncertainty as to the correctness of this total. No dividends were paid in the years 1914, 1915, 1916.

The operating expenses and revenues for the entire period of operation were not presented. The salaries paid for direction, supervision and collection were quite low during the early years of operation, ranging from nothing for the period of 1886 to 1893, to \$125 per annum between 1909 and 1914 and up to \$804 for 1916-1917.

Beginning in 1891 the respondent collected "frontage charges" from its customers totalling some \$6,644, which payments apparently were considered part of the gross revenues resulting from operation. The tariff containing the rates under attack does not contain any rule providing for the assessment of "frontage charges."

STOCKS AND BONDS.

At the time of the hearing the respondent had outstanding 5,000 shares of stock, par value \$10 per share and a floating indebtedness of approximately \$21,500, which had been incurred for the purpose of installing improved filtering and pumping facilities in 1914 and pipe line improvements made at the same time or subsequent thereto. By stipulation the parties agree that on November 15, 1917, the capital stock of the respondent was increased from \$50,000 to \$75,000 for cash to that amount paid in which was used in cancelling the said indebtedness. There are no bonds outstanding against the property.

The stock of the company is closely held in a small group and does not get into the general market. One sale made several years ago was at par, \$10 per share. The secretary-treasurer of the company at the time of the hearing considered it worth more than \$10 per share and less than \$20 per share. In 1913 and 1914 an estimated value of the stock as reported for taxation purposes was placed by the officers at \$15 per share. These figures would indicate a value somewhat in excess of the par value of the stock outstanding, namely \$75,000.

DIVIDEND RECORD.

WEST READING WATER COMPANY.

Organized 1886.

Began Service 1886.

Capital Stock—Par Value \$10.00.

Year.	Paid in Cash.	Stock Dividends.	Total Outstanding.	Cash Dividends.
1886	\$4,500		\$4,500	
1887			4,500	\$80
1888			4,500	350
1889			4,500	450
1890			4,500	450
1891			4,500	
1892			4,500	
1893			4,500	
1894			4,500	
1895	500	\$3,000	8,000	
1896	3,000		11,000	480
1897			11,000	660
1898			11,000	660
1899			11,000	660
1900			11,000	660
1901	6,600	11,000	28,600	660
1902			28,600	1,144
1903			28,600	1,144
1904			28,600	1,144
1905			28,600	1,144
1906			28,600	1,144
1907			28,600	1,573
1908			28,600	1,716
1909	1,400	15,000	45,000	1,716
1910			45,000	2,475
1911			45,000	3,600*
1912			45,000	3,600*
1913			45,000	3,600*
1914	5,000		50,000	
1915			50,000	
1916			50,000	
1917	25,000		75,000	
Total	\$46,000	\$29,000		\$29,110**

*Testimony leaves these in doubt.

**Testimony—page 34—places this total at \$25,060.

Between 1914 and 1917, company had floating debt of about \$21,000. There are no bonds against the property.

ORIGINAL COST.

The respondent offered the following statement based upon a study of the books of the company, directing particular attention to the fact that it was not considered to represent the true historical cost of the plant.

Book Cost Up to the End of 1916.

Pipe lines,	\$23,604	55
Tanks,	1,805	25
Pumping station and intake,	2,912	40
Filtering cost,	3,160	40
Standpipes,	10,947	60
New filter plant and pump station,	20,483	94
Engineering expenses,	101	35
Organization expenses,	91	76
Total,	\$63,107	25

The above statement does not include allowances for services rendered by the owners and officers of the company. The evidence indicates very clearly that even up to the time of these proceedings the accounts of the company were not kept in conformity with what would be considered to-day as good accounting practice. Expenditures that should have been charged to property account were charged to operating expenses and the books of account were stated to be in such shape that it was practically impossible to secure complete and reliable data for the purpose of determining the historical cost.

At the conclusion of the hearing held on October 5, 1917, it was agreed that the complainants would be given access to the records of the respondent company with respect to investments and operating expenses and revenues and that if they then so desired, opportunity would be afforded them for the development of further testimony along these lines. No such opportunity was requested and hence the respondents' testimony as to historical cost stands unchallenged.

REPRODUCTION ESTIMATE.

The respondent offered evidence as to the cost of reproducing the property, the estimates being based upon five-year average unit prices, and upon actual cost for some of the more recently installed items. The accrued depreciation and the allowance for annual depreciation were computed by the witness according to the straight line method. The appraisal was made as of May 20, 1917, and indicates a reproduction cost new of \$92,940, an accrued depreciation of \$13,541 and a remaining value of \$79,399, as set forth in the accompanying tabulation.

The complainants did not submit an appraisal of the property but upon the advice of their engineer accepted the reproduction estimate of the respondent as a fair estimate and substantially agreed to its adoption.

No allowance was claimed under the reproduction estimate for going cost and none is made by the Commission, although going concern will be considered and allowed for by the Commission in its termination of fair value.

Between the date of the appraisal and its presentation additions were made to the plant totalling \$1,102, of which amount \$116 was for meters and the balance for additional pipe line. The respondent is engaged in metering its system and additional investments for this purpose will be necessary. Exception might be taken to some of the allowances suggested for engineering and organization but the amounts involved do not warrant extended discussion. The unit prices used appear in general to be reasonable and under all the evidence the Commission is of the opinion that \$80,000, is a fair measure of the cost of reproduction new less accrued depreciation of the respondent's property, and that \$1,600, per annum should be allowed for annual depreciation.

FAIR VALUE AND RATE OF RETURN.

The respondent contends for a return of seven per cent. upon a fair value of \$81,887.50. The complainants do not question the seven per cent. rate of return, but request consideration of the successful financial history of the respondent and the frontage charges collected as well as of the reproduction estimates in determining the rate base. A fair value less than \$60,000, by an allowance for frontage charges collected is the most definite suggestion offered by complainants.

**RESPONDENT'S REPRODUCTION COST ESTIMATE PROPERTY OF WEST
READING WATER COMPANY AS OF MAY 20, 1917.**

1—Real estate,	\$3,675 00
2—Pumping and filtration plant, 500,000-gallon capacity,	19,132 00
3—Pumping station building,	1,546 00
4—Stand pipes—total cap. 329,000 gal., 2 of 20 feet dia., 70 feet high,	10,847 00
5—Distribution system—Piping,	
a—West Reading,	27,751 42
b—Wyomissing,	13,298 79
6—Meters,	231 00
7—Tool house	318 00
8—Tools,	185 00
9—Supplies on hand,	415 00
10—Books and office equipment,	100 00
	<hr/>
11—Contingencies—5 per cent.—Items 2-10 incl., .	\$77,499 21
	3,691 00
	<hr/>
	\$81,190
12—Engineering	
Preliminary,	\$500
Design and supervision,	4,247
	<hr/>
	\$4,747
13—Organization and administration during construction,	2,677
14—Interest during construction,	2,326
15—Working capital,	2,000
	<hr/>
Reproduction cost new,	\$92,940
Accrued depreciation,	13,541
	<hr/>
	\$79,399
Contribution for annual depreciation,	\$1,586

The Public Service Company Law enumerates a number of elements of value that may be considered by the Commission in determining the fair value of the property of a public service company for the purpose of ascertaining the revenues that should be returned to the utility from the rate payers over and above the cost of operation and maintenance and a depreciation allowance.

The respondent company began operation in 1886 and its property has grown steadily and its operation has been successful; it is a going concern. The evidence indicates that the original cost of construction is in excess of \$63,107, and that in considering this amount allowance must be made for the unsatisfactory character of the records from which it has been taken; that a consideration of the market value of the stocks and bonds outstanding indicates a value in excess of \$75,000; and that the reproduction cost new less accrued depreciation of respondent's property is \$80,000; and that some \$6,644 had been paid to the company by its consumers in the shape of frontage charges between the years 1891 and 1917.

Giving due consideration to all of the evidence submitted and to its relation to the various elements of value enumerated in the act, the Commission determines that the fair value of the property of the West Reading Water Company, used and useful in the service it is rendering, and considered as a going concern, is \$75,000, and that under the circumstances a return of seven per cent. per annum is a reasonable rate of return.

OPERATING EXPENSES.

The improved pumping and filtration facilities installed in 1914 resulted in a material change in the scheme and cost of operation and make earlier records of operating expenses of little use for the present determination. The actual operating expenses and revenues for the years ending September 1, 1916, and September 1, 1917, were submitted as follows (See p. 32):

The complainants were afforded an opportunity for checking these figures and did not question them nor did they question the efficiency of the operation.

The respondent's engineer submitted the following estimate of normal operating costs, based in part upon a study of the past expenditures of the company modified to suit present conditions and in part upon what the witness considered ideal operating conditions. The estimate totals \$8,050 per annum and was not seriously questioned by the complainants.

The above estimate was prepared as of May, 1917. Since that time the wages of the engineer have been increased from \$16 to

<i>Gross Receipts.</i>		1915-16.	1916-17.
Rents,		\$9,477 75	\$9,509 31
Frontage,		445 00	
Attachments,		178 00	
Miscellaneous,			279 80
Totals,		\$10,100 75	\$9,789 11

<i>Operating Expenses.</i>			
Wages,		\$772 00	\$1,453 17
Power,		2,517 13	2,638 07
Supplies,		830 27	750 51
Repairs,		1,371 46	311 14
Insurance,		31 60	36 25
Rent,		22 50	22 50
Miscellaneous,		101 50	93 42
Taxes,		382 00	500 82
Salaries,		450 00	804 06
Totals,		\$6,478 55	\$6,609 94

Interest Payments.

On floating debt,		\$939 90	\$1,017 71
Gross receipts,		\$10,100 75	\$9,789 11
Operating expenses,		6,478 55	6,609 94
Available for fair return and depreciation,		\$3,622 20	\$3,179 17

\$21 per week and beginning with September, 1917, a superintendent, devoting part time to the service of the company, has been employed at a salary of \$480 per annum. The collector receives four per cent. of the rents collected, approximately \$400 per annum, and the secretary-treasurer is receiving a salary of \$400 per annum, making the total expenditures for superintendence, collection and direction, \$1,280 per annum as against the \$1,840 suggested in the engineer's estimate. The present arrangement appears to result in satisfactory management and operation and no evidence was offered to show why any larger allowance should be made for these items.

Subsequent to the closing of the testimony the electric utility from which the respondent secures its power for pumping in-

Estimated Cost of Operation—Respondent's Engineer.

Superintendent,	\$1,000 00	
Labor, pumping and filtration plant, .	936 00	
Office clerk,	540 00	
	<hr/>	\$2,476 00
Electric power, based on pumpage of 80 million gals. at \$35 per million, .	\$2,844 00	
Lubricants,	30 00	
Chemicals, 17,000 lbs. alum at 3 cents, 722 lbs. Hypochlorite of lime at 5 cents,	510 00 361 10	
10½ tons coal at \$6.50,	68 25	
	<hr/>	3,813 35
Office rent,	\$120 00	
Telephone,	48 00	
Office supplies,	75 00	
	<hr/>	243 00
General law expense,	\$50 00	
General office expenses including sec- retary's salary,	300 00	
	<hr/>	350 00
Taxes, (1916),		382 00
Rentals of pipe line rights of way, ..		22 50
Insurance,		64 79
Water analysis, .....		.48 00
Maintenance of pipe lines,	\$200 00	
Intakes,	50 00	
Filter plant,	100 00	
Pumping equipment,	200 00	
Standpipes,	100 00	
	<hr/>	650 00
Total yearly operation and maintenance,		\$8,049 64

creased its charges fifteen per cent. and added a coal clause to its power rate schedule. Respondent contends in its brief that the effect of this increase is to add some \$600 per annum to the cost of power and asks the Commission to take judicial notice of this changed condition. Attention is also directed to the fact that respondent is engaged in metering the system and that a further allowance of \$100 should be made to provide for the maintenance and repair of approximately 250 meters installed subsequent to the hearing, making a total suggested allowance for operating expenses of \$8,755 per annum.

Giving due consideration to the past operation, to the changes brought about by metering and to the uncertain cost of labor and material, the Commission is of the opinion that fair allowance for operating expenses for the year 1917-1918 is \$8,100 made up as follows:

Superintendent,	\$480 00
Pumping power,	3,300 00
Pumping station labor,	1,092 00
Supplies,	970 00
Repairs,	650 00
Office rent, telephone and office supplies,	100 00
Right of way payment,	23 00
Analyses,	48 00
Legal,	50 00
Insurance,	65 00
Taxes,	500 00
Secretary's salary, collector, misc. office expenses, .	800 00
	<hr/>
	\$8,078 00
or in round numbers,	\$8,100 00

The Reasonableness of the Rates.

Under the above findings of the Commission the total cost of the service rendered by the respondent is \$14,950 per annum, made up as follows:

Operating expenses,	\$8,100
Depreciation allowance,	1,600
Seven per cent. return on \$75,000,	5,250
	<hr/>
Total,	\$14,950

The respondent submitted the following estimate of revenues under the new rate, based upon a house to house canvass of the properties, and upon the services being supplied as of September 1, 1917, with allowance for the effect of the compulsory metering under the new rate schedule:

Public Fire Protection Service:

West Reading Borough:		
Twenty-one hydrants at \$12.00, 4.35 miles of main at \$200,	\$1,122	
Wyomissing Borough:		
Four hydrants at \$12.00, 1.14 miles of main at \$200,	276	
	<hr/>	\$1,398
General Service: 838 Connections.		
Existing Metered Service:		
Ready to serve charges on 21 meters range from 3-inch to 5½-inch,	\$241	
Consumption—1,300,000 cu. ft. at 10 cents per 100,	1,300	
Required Metered Service:		
Ready to serve charges—158 5½-inch meters at \$7.00,	1,106	
Consumption—632,000 cu. ft., 10 cents per 100,	632	
Flat Rates Service:		
West Reading,	7,738	
Wyomissing,	3,726	
	<hr/>	\$14,743
Less estimated discount for prompt payment,	737	
	<hr/>	\$14,006
		<hr/>
		\$15,404

Under the new rules the consumers entitled to a flat rate basis may elect a metered service. Approximately 266 connections on a flat rate basis pay between \$20.00 and \$31.50 per annum, and presumably a number of these consumers will elect metered service. Assuming that all of these takers demand metered service, the respondent estimates that the total revenues will be reduced to \$12,639 per annum. The respondent did not offer any estimate of the reduced operating expenses to be expected as a result of the increased use of meters, nor was any evidence offered concerning the normal growth in business. Due to the uncertain effect of the metering programme and of the new rates and regulations, it is difficult to reach a definite conclusion with respect to the revenues, but for the conditions existing at the time of the

inquiry it is our opinion they will not exceed the cost of the service and hence are not unreasonable in total amount.

It now becomes necessary to determine whether the rates distribute the burden equitably among the patrons of the company. The complaining boroughs attack the fire protection rates as being excessive in view of the character of the service furnished and also as being in violation of contracts. The contracts features involved in the public fire protection service rates will be discussed later. The complaining consumers question the reasonableness of the increased rates for general service and also allege that the rates for public fire protection service are excessive. The testimony with respect to the reasonableness of the rates for general service was limited to their effect upon the total revenues arising from their application. With respect to the rates for public fire protection service the respondent did not attempt to arrive at a rate by segregation, but in view of the restricted service it is in a position to render, believed that the service should return to it about ten per cent. of the total revenues instead of from twenty per cent. to thirty per cent. as fixed by this Commission in other cases. The amount to which the company thought it was entitled, about \$1,500 was apportioned on a basis of an annual charge of \$12.00 per hydrant and \$200 per mile of main, four-inch or larger in diameter.

Respondent's system renders two distinct services, one a public fire protection service and the other a general service to its patrons who are users of water and who in general make up the community or municipal corporation to which the first service is rendered. Each of these services should bear its fair share of the total burden. The Commission has discussed in earlier reports the various methods of determining the portion of the property chargeable to public fire protection service and the division of the operating costs into capacity, consumer, and out-put elements, for the purpose of arriving at the cost of a particular service. An application of these theories to the case before us, giving due recognition in the computations to the limitations of the system and to its method of operation, gives the following results:

The operating expenses divide thirty-one per cent. to capacity, thirteen per cent. to consumer, and fifty-six per cent. to out-put costs. Under the excess theory fourteen per cent., and under

the proportional plant theory based upon peak load thirty-one per cent. of the property is chargeable to the public fire protection service. The division of the property indicated is lower in both instances than usually obtains in plants of this size, due to the particular circumstances existing. Applying these percentages to the costs and allowances hereinbefore determined results in an annual cost of fire protection service of \$1,310 under the excess theory, and \$2,900 under the peak load theory. The first figure is undoubtedly a minimum figure because the method by which it is determined assumes that the plant is primarily designed and built for general service and that fire protection service should be charged only with costs clearly excess in their nature. The method does not recognize fully the fire protection actually given by a system. The proportional plant method assumes that the plant was installed to perform both functions, and that it performs them to the same degree of adequacy. Strong arguments can be presented for or against either viewpoint. The problem is not one that permits of absolute numerical determination and within limits variations in the determination will merely result in a transfer of the burden from the individuals as patrons of the company to the individuals as members of the community or municipal corporation, or vice versa. The rates proposed by the respondent will return \$1,398 per annum to the company and considering all of the circumstances in this case the Commission is of the opinion that as far as the cost of the service is concerned this charge is certainly not excessive, and neither will it work an injustice to the individual patrons of the company by placing upon them a burden which belongs upon the municipalities.

The Contracts for Fire Protection Service:

Prior to 1915 and 1916 the Boroughs of West Reading and Wyomissing, respectively, paid nothing for fire protection service. The contract with the Borough of West Reading was entered into on April 30, 1915, and runs from April 1, 1915, to March 31, 1920. The contract with the Borough of Wyomissing was entered into on May 12, 1916, and runs from the date of execution to March 31, 1920. The substance of the two contracts is the same and may be summarized as follows:

"The company agrees to maintain its present equipment of pumps, mains and standpipes, or their equivalent, to inspect and test its fire hydrants at reasonable intervals, and to keep the same in condition available for use for fire protection as at present, subject to accident, damage, breakdown, repairs, weather or other conditions beyond its control, and to permit the borough, by its fire department to take water from said fire hydrants for the extinguishment of fire.

"The company agrees further to purchase and install such additional fire hydrants as may be requested by the borough council and agreed to by the company, from time to time.

"The borough agrees to pay to the company at its office a sum equal to a rental of \$10.00 per year per hydrant, in semi-annual installments on the first days of June and December of each year for the period commencing on the date of the execution hereof and expiring on the 31st day of March, 1920."

Both contracts contain the usual clause to the effect that neither the purpose nor intent nor the obligation of the contract is such as to impair the powers of the Commission. The contract with the Borough of West Reading was approved by the Commission on September 8, 1915, and the contract with the Borough of Wyomissing on June 14, 1916. Subsequent to the execution of the West Reading contract the respondent installed duplicate pumping equipment and at the request of the borough authorities laid an additional six-inch main on Penn avenue, for the purpose of securing improved fire protection and of avoiding, at some future time, the opening of this street which then was being repaved by the borough. Subsequent to the execution of the Wyomissing contract the respondent laid some additional piping in the Borough of West Reading, which made available two six-inch connections between the Wyomissing portion of the system and the West Reading portion, where only one had previously existed. These improvements cost the respondent about \$5,000.

The position of the respondent with respect to the contracts is that the improvements installed made possible a greatly increased fire protection service, and that this justified the respondent in attempting to avoid the contracts. The changes referred to undoubtedly have made available an increased fire protection service in both boroughs. There is nothing in the record to indicate the

attitude of the Borough of West Reading with respect to increased payments when it made its demand for improved facilities, nor is there any evidence that any demand was made by the respondent at that time for a modification in the terms of the contract. Neither is there any evidence to indicate a request for improved facilities by the Borough of Wyomissing.

We are not able to conclude from the testimony that the fire protection rates should be increased over those so recently established under a municipal contract duly agreed to by the parties who are now complainant and respondent, and which contract when presented to the Commission was approved. Particularly is this so when the contract has such a short time, about two years, yet to run. By our approval we passed upon the reasonableness of the contract rate, and we think that the agreement so entered into by the municipality and the company when approved by the Commission is some evidence of the value of the prescribed service rendered by respondent. The measure of its importance varies, of course, with the length of time the contract has yet to run, and by later changed conditions, if any.

It does not appear that the Commission ought lightly to permit the setting aside of the rate provision of a contract which at its date fixed a value upon the service which the utility company agreed to render to the municipality.

In the circumstances the Commission sustains the complaint, finding that the value of the service is the amount which would be realized under the contract and that the proposed rates against which the complaint is made are unjust and unreasonable. An order will be issued directing the respondent to establish the fire protection rates fixed in said contract by tariff amendments to become effective within three weeks on one day's notice to the public and the Commission.

With respect to the rates for general service, the Commission finds that they will not produce an unreasonable return and will therefore dismiss the complaints concerning them. Due to the uncertain effect of the metering programme upon the operating revenues and expenses, the respondent will be directed to submit on or before September 30, 1919, an analysis of the company's operations for the years ending September 1, 1918, and September 1, 1919, which will receive the consideration of the Commis-

sion at that time and form the basis of determining whether further adjustments in the rates are necessary. An order will issue accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, October 28, 1918, It is hereby ordered: That the respondent, the West Reading Water Company, reestablish the rates set forth in its contract with the Borough of West Reading approved by the Commission September 8, 1915, and of its contract with the Borough of Wyomissing approved June 14, 1916, and make the necessary changes in its tariffs to become effective within three weeks from the date of this order, on one day's notice to the public and the Commission.

It is further ordered: That with respect to all other rates the complaints be, and the same are hereby dismissed.

It is further ordered: That, the respondent furnish and submit to the Commission on or before September 30, 1919, an analysis of its operations for the years ending September 1, 1918, and September 1, 1919, which will then receive consideration and form the basis of determining whether further adjustment in its rates are necessary.

By the Commission,

WM. D. B. AINEY, *Chairman.*

FRANK L. THOMPSON AND BOROUGH OF BERLIN *v.* BERLIN WATER
COMPANY.

*Rates—Water companies—Increase of for domestic service and
fire protection—Alleged to be excessive and unreasonable—
Municipal contract—Inadequate service.*

The complaints alleged that the new tariffs filed by the respondent established rates which were unjust, unreasonable, and discriminatory, and in excess of those provided by municipal contract. It was also alleged that the respondent maintained insufficient water pressure, and failed to install additional fire plugs when demanded by the borough. No testimony was offered in support of these last allegations. It was shown that the new rates would return to the respondent a sum less than seven per cent. on the agreed valuation.

Held: The complaints should be dismissed.

COMPLAINT DOCKET NOS. 1577 AND 1616.

Report and Order of the Commission.

N. T. Booce, for the complainants.

Ralph J. Baker, for the respondents.

AINEY, Chairman:

The complaints in these proceedings allege that the tariffs filed by the respondent company on or about May 24, 1917, and July 1, 1917, make effective rates for domestic service and fire protection which are unjust, unreasonable and discriminatory. There is also an allegation of inadequate water pressure and failure to install additional fire plugs when demanded by the borough. No testimony was presented in support of these last allegations.

The complaint of the Borough of Berlin further alleges that the proposed rates for fire protection are illegal for the reason that any change in the rate fixed by the franchise ordinance enacted June 27, 1912, by the borough and accepted by the company, is an impairment of a contract. The Commission has passed upon this question in former opinions determining that such a contract does not preclude it from exercising its authority to inquire into the reasonableness of the rates complained of.

In order to determine whether the proposed rates for service were just and reasonable, an engineers' conference to ascertain the value of the property of the respondent company was agreed upon. The report of the conference, duly offered in evidence, shows that the value of the property based upon reproduction cost new less depreciation is \$70,000; the operating expenses \$2,471, the annual depreciation \$840. The annual gross revenue to be earned by the respondent company based on seven per cent. return on valuation amounts to \$8,211; based on eight per cent. return amounts to \$8,911. The gross revenue which the company would actually receive under the proposed rates from both fire protection and domestic and industrial service is \$7,766, or less than the company is entitled to receive under the valuation placed by the engineers representing the complainants, the respondent company and the Commission.

For the above reasons the Commission is of the opinion that the complaints should be dismissed and an order to that effect will accordingly issue.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complains and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, November 19, 1918, It is ordered: That the complaints in this case be and the same hereby are dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

BOROUGH OF SCHUYLKILL HAVEN *v.* SCHUYLKILL HAVEN GAS &
WATER COMPANY.

Penalty imposed for failure to comply with order of the Commission.

COMPLAINT DOCKET No. 171.

Order of the Commission.

J. A. Noecker, for the complainant.

Theodore J. Grayson, for the respondent.

AINEY, Chairman :

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon supplemental complaint alleging noncompliance by the respondent, the Schuylkill Haven Gas & Water Company, with the provisions of the final order of the Commission to it directed on May 7, 1915, and the Commission having made an investigation thereof and due consideration of the matters and things involved having been had :

Now, to wit, November 12, 1918, the complaint is sustained; and it is found by the Commission that the respondent, the Schuylkill Haven Gas & Water Company, has failed, omitted, neglected, and refused to obey, observe and comply with the final order of the Commission to it directed on May 7, 1915, for and during a period of thirty days, to wit, from September 1, 1918, to September 30, 1918, both days inclusive; and,

It is ordered: That the Schuylkill Haven Gas & Water Company shall forfeit and pay forthwith to the Commonwealth of Pennsylvania the sum of fifty dollars (\$50.00) per day for each of thirty days from September 1, 1918, to September 30, 1918, both days inclusive, amounting to the total sum of fifteen hundred dollars (\$1,500.00) the same being the penalty for the violations of said order of the Commission of May 7, 1915, as provided by Article VI, Sections 35 and 36, of the Act of July 26, 1913, P. L. 1374, as amended by the Act of June 3, 1915, P. L. 779.

By the Commission,

WM. D. B. AINEY, *Chairman.*

EMPIRE LIME KILN *v.* STATE-CENTRE ELECTRIC COMPANY.*Rates—Electric companies—Minimum charge—Modification of.*

COMPLAINT DOCKET No. 2001.

Report and Order of the Commission.

Conrad Miller, for the complainant.*John S. Fisher*, for the respondent.

BY THE COMMISSION :

Complainant is engaged in the quarrying of limestone and the manufacture of lime products near Bellefonte, Centre County. The complaint filed with the Commission on April 13, 1918, alleged that the increased rates for electric service contained in respondent's tariff P. S. C.—Pa. No. 2, effective February 1, 1918, were unjust and unreasonable. At the hearing held on June 5, 1918, testimony was offered relative to the character of the service received and the circumstances surrounding its installation. The complainant has a forty-horsepower motor installed but appears to require only twenty-horsepower for his present needs. Under the prior rates, complainant's bills ran between \$10 and \$15 per month. The rates that went into effect February 1, 1918, increased the energy charge and also imposed a minimum charge requirement of \$1 per month per connected horse power. The increase to the complainant was such that he discontinued the use of the service. It is evident that in addition to having excess motor capacity installed the complainant is a short hour user and hence should expect to pay more for his service than he would pay if he were a long hour user.

The respondent expressed a willingness, in order to meet the complaint, to fix the minimum on a twenty-horsepower basis, if approved by the Commission, and such action would satisfy the complainant. While it would be desirable to adjust the complaint the Commission is of the opinion that the adjustment proposed would be setting up a discriminatory situation as far as other patrons of the respondent are concerned and hence should not be

approved. A better solution would be a modification of the minimum charge requirement contained in rate "C" under consideration so as to recognize, either directly or by the use of an average factor, the actual demand; or if the connected load basis is to be retained, to reduce the minimum charge per horse power, which seems to be on a somewhat higher level than in other schedules for similar service on file with the Commission.

In view of the above facts, the Commission suggested to the respondent that it make a study of its power service with the view of filing a modification of the rate under attack that would bring about a settlement of the complain and at the same time recognize the rights of the other power patrons. After extended correspondence the respondent offered for filing a supplement to its tariff, reducing the minimum charge per connected horsepower for motors over five-horsepower and up to fifty-horsepower from \$1 to seventy-five cents per month. The modification will reduce the minimum charge to the complainant from \$40 to \$30 per month and to other consumers in this class in the same proportion. The complainant is not satisfied with the reduction. Considering all of the circumstances and the facts before the Commission, we are of the opinion that the complaint has not been sustained and that it should be dismissed upon the putting into effect of said supplement offered by the respondent.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer filed and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, November 20, 1918, It is ordered: That the complaint in this case be and the same is hereby dismissed upon putting into effect the supplemental tariff offered by respondent as set forth in said report.

By the Commission,
WM. D. B. AINEY, *Chairman.*

A. T. ECKLES, ET AL., v. SHARON AND NEW CASTLE STREET RAIL-
WAY COMPANY.

*Rates—Street railway companies—Increase of—Reasonableness
—Comparisons—Earnings and operating expenses.*

The complaint alleged that the increased rates of the respondent were unreasonable and excessive. The respondent operates on the five-cent zone basis, and its rates over the zones in question averaged about three cents per mile. The net earnings of the respondent for 1917 were \$1,714.48, and for the first eight months of 1918 (including one month at the increased rates) the net loss was \$2,753.20. No evidence of valuation was submitted.

The Commission held that the rates were not excessive or unreasonable, and dismissed the complaint.

COMPLAINT DOCKET NO. 2216.

Report and Order of the Commission.

Robert L. Wallace, for the complainant.

Ralph J. Baker, for the respondent.

RILLING, Commissioner :

A. T. Eckles, H. R. Pickett and J. A. Davidson complained that the rates on the line of the Sharon and New Castle Street Railway Company, operating between the City of New Castle, Pennsylvania, and Hubbard, Ohio, are excessive and unreasonable. The rates complained of were originally effective July 18, 1918, on the day the complaint was filed. They were, however, by permit postponed to August 1, 1918.

Respondent's line extends from its terminal at Diamond and Washington streets in New Castle, Pennsylvania, in a northwesterly direction, crossing the Pennsylvania state line and continuing to Hubbard, Ohio, a distance of 18.85 miles, where it connects with another line running from Sharon, Pennsylvania, to Youngstown, Ohio. Seven and one-half miles of respondent's line are in Ohio, the balance in Pennsylvania. The territory through which it passes is generally a farming community, not thickly populated, and the travel is not heavy.

While the complaint is lodged against the rates over respondent's entire line, the testimony in support thereof was restricted to its line in Pennsylvania, particularly so much thereof as extends about five miles out of New Castle. Respondent operates on a five-cent zone basis. Its first zone extends from its terminal in New Castle to the city line, about one mile. Its second zone extends to stop No. 92A, a further distance of nearly three miles, and its third zone extends to stop No. 88 at a small country settlement, approximately five miles from its terminal at New Castle, making its rate over these three zones a trifle over three cents per mile.

Respondent assumed the burden of proof and offered in evidence a statement of earning and operating expenses over its entire line for 1917 and eight months of 1918 as follows:

	Total Earnings.	Operating Cost.	Net Earnings.
1917,	\$40,305 62	\$38,591 14	\$1,714 48
1918 (Eight months), ...	27,072 85	29,826 05	2,753 20*

*Loss.

The statement for eight months in 1918 includes one month at the increased rates complained of. In the operating cost there is nothing included for taxes, interest, depreciation reserve or fair return. The testimony of respondent's superintendent is that current for power to operate respondent's line is purchased at switchboard cost and included in the foregoing statements as such. No evidence of any valuation was submitted.

The figures shown by respondent were not disputed. Respondent also furnished the Commission with an estimate of probable earnings and operating cost for a year under the increased rates. We think, however, that the cost of operation and earnings in the past are the best evidence on which a conclusion may be reached.

Complainants offered in a general way some rates charged on other interurban lines lower than the ones complained of, but did not furnish any necessary evidence to show under what conditions the lower fares were collected.

The fact that respondent's line connects at each end with another line of railway owned and operated by the same interests

owning and operating respondent's line, cannot control or materially affect the extent of respondent's rates. No evidence was offered showing that it was a profitable feeder to either line.

It is clearly shown that the respondent is not earning more than its proper operating expenses. The Commission can, therefore, reach a conclusion without ascertaining the fair value of respondent's line as a rate basis.

The conclusion of the Commission is that under all the evidence the rates of respondent over its line in Pennsylvania cannot be held to be either excessive or unreasonable. The complaint, therefore, will be dismissed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof :

Now, to wit, November 20, 1918, It is ordered: That the complaint in this case be and the same hereby is dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

TOWNSHIP OF LOWER MERION, ET AL., v. SPRINGFIELD CONSOLIDATED WATER COMPANY.

Rehearing refused.

COMPLAINT DOCKET NOS. 2306, 2308, 2309, 2310, 2315, 2323, 2326, 2333, 2362, 2370, 2384, 2392, 2398, 2422, 2423, 2424, 2451, 2471.

Order of the Commission.

Parker S. Williams and *C. B. Miller*, for the Townships of Lower Merion, Cheltenham and Springfield, Montgomery County.

Harry S. Ambler, Jr., for the Township of Abington.

C. B. Collins, for the Borough of Lansdowne.

Morton Z. Paul, for the Borough of Sharon Hill.

Albert N. Garrett, for the Borough of Swarthmore.

Thomas J. Hunt, for the Borough of Rutledge.

W. Roger Fronefield, for the Townships of Haverford and Upper Darby.

William I. Schaffer and *Montgomery Evans*, for the Springfield Consolidated Water Company.

BY THE COMMISSION :

These matters being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answers on file, and having been duly heard and submitted by the parties, and the Commission, after due investigation, being of the opinion that the issues involved in these proceedings have been determined by the Commission in its order dated April 8, 1918, entered to complaints filed by the Borough of Conshohocken, et al., against the Springfield Consolidated Water Company :

Now, to wit, November 25, 1918, *It is ordered*: That the complaints in these proceedings be and the same are hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman*.

JAMES W. CORNISH *v.* FAIRVIEW WATER COMPANY.

Rehearing refused.

COMPLAINT DOCKET No. 1341.

Order of the Commission.

Wilton A. Erdman, representing the complainant.

S. E. Shull, representing the respondent.

AINEY, Chairman :

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition of the complainant for a rehearing, and the matters and things involved therein having been fully considered :

Now, to wit, November 25, 1918, *It is ordered*: That the prayer of the petition for a rehearing be, and the same is hereby refused, and the order of the Commission, issued February 26, 1918, is hereby affirmed.

By the Commission,

WM. D. B. AINEY, *Chairman*.

EAST HICKORY AND ENDEAVOR SUBSCRIBERS OF THE BELL TELEPHONE COMPANY *v.* BELL TELEPHONE COMPANY OF PENNSYLVANIA.

Service—Telephone companies—Discontinued—Agreement between two public service companies—Increased cost for service with another company.

The respondent made an agreement with the Endeavor Telephone Company whereby service was discontinued by the former in territory served by the latter. Connection with the Endeavor company was maintained so as to afford service to other points. The agreement also anticipated improved service by the Endeavor company, the cost of which was to be

met by increased rates. The subscribers of the respondent complained of the discontinued service, and contended that they are now subjected to a higher charge for the inferior service of the Endeavor company.

The Commission found that the above-mentioned agreement deprived no patron of service and promised to be beneficial to all; whereupon the complaint was dismissed.

COMPLAINT DOCKET No. 1795.

Report and Order of the Commission.

Paul H. Burns, for respondent.

RILLING, Commissioner :

The respondent, the Bell Telephone Company, operates an exchange at Tionesta, the county seat of Forest County, Pennsylvania. Its trunk lines extend from this exchange northerly along the Allegheny river to Tidioute and Warren. About eight miles north of Tionesta there is a village on the west side of the Allegheny river called West Hickory, and one on the east side called East Hickory. Another town adjacent to East Hickory is called Endeavor.

The Endeavor Telephone Company, a mutual company organized in 1909, had at the time of the filing of this complaint less than 200 patrons in Endeavor, East Hickory and adjacent territory. The service it rendered was inferior and intermittent; very limited service was rendered during the night-time and on Sundays. With many patrons on a single line its rate, including an initial payment of \$25.00, was \$5.00 per year, the patron supplying his own telephone. Where the company furnished the telephone, the annual rental was \$8.00.

The Bell Telephone Company served through its Tionesta exchange thirteen patrons in Endeavor and two in East Hickory; also a limited number in West Hickory. These patrons pay \$18.00 per year for residence service and \$24.00 for business service. Some of them were subscribers to both the Bell and Endeavor systems. These thirteen patrons had free service with all of the Tionesta patrons of the Bell company. The patrons of the Endeavor company could, through a connection between its exchange and

the Bell company with the payment of toll, communicate with all the patrons of the Bell company at Tionesta and elsewhere.

The respondent company made an arrangement with the Endeavor company whereby respondent would withdraw its local service from all the territory served by the Endeavor company, which meant that it would discontinue service to its fifteen subscribers therein. It would, however, continue its connection with the exchange of the Endeavor company at Endeavor. The arrangement further contemplates that the Endeavor company should by the expenditure of the necessary capital improve its facilities and its service for which it has filed with the Public Service Commission a new tariff, wherein its rates are specified as follows:

	Individual Line.	Two-Party Line.	Multi-Party Line.
1. Business,	Q \$30 00 (C)	Q \$24 00 (C)	\$15 00 (A)
Residence, . . .	Q 24 00 (C)	Q 18 00 (C)	10 00 (A)

Q Applies within one-half mile of central office. Beyond this limit a charge for mileage is made at the rate of \$5.00 per annum for each quarter mile, or fraction thereof.

2. A charge for residence of \$6.00 and for business of \$10.00 per annum is made for switching calls from telephones owned by subscribers and connected on lines owned and maintained by subscribers. (A)

3. A toll charge of five cents is made for local calls for non-subscribers. (A)

4. Subscribers are entitled to service without toll with Endeavor and East Hickory and West Hickory. (C)

5. Tolls to other points are quoted by the Central District Telephone Company.

(A) Indicates advance or increase in rate.

(C) Indicates change or addition.

All of the patrons of the Endeavor company may, upon the payment of toll, communicate with the Tionesta exchange of respondent. When these arrangements are completed it will result in a single company serving East Hickory and Endeavor, furnishing a higher grade of continuous service at the increased rate stated. The respondent will continue to serve its patrons in West Hickory, giving as a reason therefor that on account of the railroad passenger and freight station located there such service is necessary.

The complainants in this case are the patrons of respondent company at Endeavor and East Hickory, who object to having their service with the respondent company through its Tionesta exchange discontinued; also advancing the reason that they will be obliged to pay the increased rental to the Endeavor company with its inferior service.

The proposed arrangement between the respondent and the Endeavor Telephone Company contemplates an improvement in its facilities and service and will permit it to exclusively serve its territory.

The fact that the Endeavor Telephone Company has in the past rendered inferior service is not here important. It is a public utility and as such is in duty bound to render adequate service at reasonable rates. If, after the contemplated arrangements are completed, there should be any inferior service on its part, this may be corrected upon complaint filed with this Commission.

The conclusion of the Commission is that the complaint be dismissed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, December 10, 1918, It is ordered: That the complaint in this case be and the same hereby is dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

THE GENERAL MINE COMMITTEE OF THE BOROUGH OF MOUNT CARMEL AND THE TOWNSHIP OF MOUNT CARMEL, NORTHUMBERLAND COUNTY, *v.* THE SHAMOKIN AND MOUNT CARMEL TRANSIT COMPANY.

Rates—Increase of—Excess fare receipts.

Respondent company entered into an agreement to issue certificates of excess payments on January 29, 1918, which has not been made effective. The Commission will make an order directing respondent company to carry its agreement into effect.

COMPLAINT DOCKET No. 1973.

Order of the Commission.

L. S. Walters and *D. W. Hughes*, for complainants.

Voris Auten and *Charles A. Snyder*, for respondent.

AINEY, Chairman :

This matter being before the Commission upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had; and it appearing that at hearing before the Commission, January 29, 1918, the following agreement was entered into by the complainant and respondent :

"It is also agreed that certificates of excess payments will be issued by the respondent as soon as the certificates can be printed and put in shape for use,"

and it appearing further that the terms of this agreement have not been made effective by the issuance to patrons of these certificates of excess payments :

Now, to wit, April 16, 1918, the respondent, The Shamokin and Mount Carmel Transit Company, *is ordered* to furnish within five days from the date of service hereof to all its passengers, certificates to evidence payment of fare in excess of rates in effect prior to June 4, 1917, and to continue thereafter to furnish said certificates to its passengers until such time as the proceedings now pending before the Commission, involving the reasonableness of the increased rates, have been finally determined.

By the Commission,

WM. D. B. AINEY, *Chairman.*

CITIZENS OF ALLISON PARK *v.* BALTIMORE & OHIO R. R. Co.

In re train service between Allison Park and Pittsburgh, Pa.

COMPLAINT DOCKET No. 1558.

Report and Order of the Commission.

J. H. Johnston, for complainants.

George H. Stein, for respondent.

RILLING, Commissioner :

The respondent, the Baltimore & Ohio Railroad Company, is complained of because it has discontinued two local passenger trains, Nos. 169 and 170, operated between Pittsburgh and Allison Park, a suburb about ten miles north thereof and other stations northward. A large amount of testimony was taken, and it appears therefrom that it would add to the convenience of the public in Allison Park and the intervening stations between it and Pittsburgh to have the trains restored. This portion of respondent's road is very much congested by the great demands made thereon in order to move its freight traffic and for the further reason that it is also used by the Buffalo, Rochester & Pittsburgh Railway Company in order that its trains may enter Pittsburgh. It is a double track road running through a narrow valley which would make the construction of additional trackage a matter of great expense.

On account of demands made on respondent by the government, the Commission, without reaching any conclusion as to the merits of the complaint, will postpone making any finding at this time. The facilities of respondent should be utilized in the present crisis to the full extent thereof in assisting the government in carrying on the war. We feel sure that although complainants may suffer inconvenience by reason of the acts complained of, they will readily concur in the postponement of any action on our part until a more opportune time arrives. The complaint will be dismissed with leave to renew the same when normal conditions again prevail.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having been on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, May 20, 1918, It is ordered: That the complaint in this case be, and the same hereby is dismissed, with leave to the complainants to renew the same when normal conditions again prevail.

By the Commission,
WM. D. B. AINEY, *Chairman.*

A. S. HARSHBARGER AND C. G. STAMBAUGH *v.* LEWISTOWN & KISHACOQUILLAS TURNPIKE CO.

Order of the Public Service Commission—Duty of public service company to obey—Penalty for refusal to obey.

The Commission will direct the forfeiture prescribed by Secs. 35 and 36 of Art. VI, of the Public Service Company Law for failure on the part of a utility company to comply with the terms of the final order of the Commission to it directed.

COMPLAINT DOCKET No. 1465.

Order of the Commission.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon supplemental complaint alleging noncompliance by the respondent, the Lewistown and Kishacoquillas Turnpike Company with the provisions of the final orders of the Commission duly issued on July 3, 1917, and January 8, 1918, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had:

Now, to wit, October 28, 1918, the complaint is sustained; and it is found by the Commission that the respondent, the Lewistown and Kishacoquillas Turnpike Company, has failed, omitted, neglected and refused to obey, observe and comply with the final orders of the Commission to it directed on July 3, 1917, and January 8, 1918, for and during a period of twenty-eight days being from October 1, 1918, to October 28, 1918, both days inclusive: and

It is ordered that the Lewistown and Kishacoquillas Turnpike Company shall forfeit and pay forthwith to the Commonwealth of Pennsylvania the sum of fifty dollars (\$50.00) per day for each of twenty-eight days from October 1, 1918, to October 28, 1918, both days inclusive, amounting to the total sum of fourteen hundred dollars (\$1,400.00) the same being the penalty prescribed for violation of the provisions of Sections 35 and 36 of [Article VI of] the Act of July 26, 1913, P. L. 1374, as amended by the Act of June 3, 1915, P. L. 779.

By the Commission,

WM. D. B. AINEY, *Chairman.*

BOROUGH OF GIRARDVILLE AND SCHUYLKILL ELEC. CO.

Municipal contracts—Street lighting—Competition between two companies already established and serving the same territory.

Where two competing electric companies are already authorized by charter and ordinance and are engaged in supplying the public in a municipality, the Commission will not withhold its approval of a street lighting contract between the municipality and one company, upon the protest of the other.

MUNICIPAL CONTRACT DOCKET NOS. 673 AND 678—1917.

Report and Order of the Commission.

Chas. A. Snyder, for Schuylkill Elec. Co.

Joseph deF. Junkin, *Byron A. Milner* and *Otto E. Farquhar*, for Borough of Girardville.

BY THE COMMISSION:

In disposing of the application for approval of the lighting ordinance contract between the Schuylkill Electric Company and the Borough of Girardville (M. C. 461), we said:

"We would approve the street lighting contract entered into by the borough and the applicant if the same had not been bound up with the contract for domestic lighting."—5 P. C. R. 326.

A new ordinance contract is now before us (M. C. 678) with the objectionable feature removed, and with it is presented a franchise ordinance (M. C. 673) authorizing the Schuylkill Electric Company to place poles and string wires in the borough streets.

Protests were presented by the Eastern Pennsylvania Heat, Light and Power Company which for the last sixteen years has, under an ordinance contract now expired, been lighting the streets. These cases present elements of some difficulty, not in determining the administrative policy which under the Commission's rulings must be applied, but with respect to results which inevitably must flow from the competitive conditions already existing, and which will not be created by our order.

Unfortunately where the burden of two public service companies has been placed upon the public which needs but one of them, any order which we may make naturally but indirectly affects one or the other of the competitors, and the consequences must ultimately fall upon the ratepayers in the localities where they both serve.

The facts which distinguish the present applications from those cases where the Commission has withheld its approval are summed up in the statement that the applicant, the Schuylkill Electric Company, is already serving the Borough of Girardville under an ordinance approved in 1904, authorizing its predecessor to erect poles and string wires, etc., on all of the streets, alleys and lanes of the borough. Under this ordinance it has supplied the inhabitants with light and power for commercial and industrial purposes. It is true that the ordinance which specifically provides that these poles and wires may be placed upon all its streets, alleys, lanes, etc., shall "not be construed to authorize the Schuylkill Light, Heat and Power Company (applicant's predecessor), or its successors or assigns, to erect poles or other apparatus, or to string wires or hang lamps for street lighting purposes on the streets of said borough." At most this would appear to relate to the use to which the facilities may be put, rather than to place any limitation upon the occupancy of the streets by poles and wires.

It appears from the evidence that for a period of ten months, some sixteen years ago, one of the applicant's constituent companies did supply the borough with street lighting, but since that

time, under an ordinance contract, the streets have been lighted by the protestant. The service rendered by protestant was adequate and its equipment sufficient for the public need. Both companies under their charters may engage in the business of street lighting in Girardville, and no question of forfeiture or failure to begin the exercise of corporate rights within two years arises.

The municipality invited competitive bidding for lighting the streets, and the applicant and protestant each submitted proposals in due form not materially different in the rates proposed. The bid of the applicant was accepted and that of the protestant rejected. The applicant in order to fulfill its obligation would, according to the testimony of its superintendent, be compelled to erect additionally to its present street facilities about thirty-four poles and to string considerable wire.

The protestant has already standing and in use sufficient poles and strung wires to properly and adequately serve the public. Should we approve the contract here presented it may cause a loss to protestant for certain of its equipment that would no longer be used or useful. If on the other hand we refused to approve, the applicant would continue to have a plant reserve capacity with no demand. In either case there is financial loss.

We have no hesitation in saying that these two companies each authorized by charter and ordinance and actually engaged in rendering public service in Girardville, burden that community with all the weight incident to competitive waste, a condition which we would not permit if either were seeking entry in the face of a field exclusively occupied by the other. As both are serving Girardville, we cannot under the facts disclosed find any just ground to distinguish between them, or to say to one we will limit the scope of your legitimate activities. The municipality has expressed its choice, and we are not disposed to interfere with the proper exercise of municipal discretion.

It is doubtful whether an additional ordinance authorizing poles and wires to be erected was necessary. Its effect, however, was to remove any doubt as to the proper interpretation of the ordinance of 1904, and with that thought before us we approve Municipal Contract No. 673. As to Municipal Contract No. 678, covering the contract, its terms appeared reasonable and the municipal judgment having been expressed with respect to it, it was likewise approved.

We are of the opinion that the approval of each was necessary and proper for the safety, accommodation and convenience of the public, and that the certificates heretofore issued should not be revoked, and that an order shall issue refusing a rehearing.

ORDER.

This matter being before the Public Service Commission upon petition for rehearing and answer thereto, and having been duly heard and submitted and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and the conclusions thereon, which said report is hereby approved and made a part hereof ;

Now, to wit, June 11, 1918, it is ordered: That the rehearing be, and the same is hereby refused, and the action heretofore taken approving the contracts be, and the same is hereby affirmed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

IN RE GRADE CROSSINGS OVER STATE HIGHWAY ROUTE No. 53.

Investigation upon the Commission's own motion of the dangerous condition of two grade crossings at points where the tracks of the Black Lick Branch of the Clearfield Division of the Pennsylvania Railroad Company cross State Highway Route No. 53, in Cambria and Allegheny Townships, Cambria County.

APPLICATION DOCKET No. 1454—1917.

Report and Order of the Commission.

F. J. Hartman, for P. R. R. Co.

J. W. Hunter, for State Highway Department.

Walter Jones, for Cambria County.

A. M. Schumacher, for protestants.

BY THE COMMISSION:

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon its own motion, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, the Commission finds and determines that the existing crossing at grade at points where the tracks of the Black Lick branch of the

Clearfield Division of the Pennsylvania Railroad Company cross State Highway Route No. 53, in Cambria and Allegheny Townships, Cambria County, Pennsylvania, are dangerous to the traveling public, and the abolition thereof is necessary for the accommodation, convenience and safety of the public, said crossings to be abolished in accordance with plans and specifications prepared by the State Highway Department and on file in this office, which said plans providing for the relocation of the highway between the said crossings at grade are satisfactory to the several municipalities and parties in interest and are hereby approved and adopted.

The Commission further finds and determines that the costs and expenses incident to the said abolition exclusive of compensation for damages which may result to owners of adjacent property taken, injured or destroyed, by reason of said abolition, shall be borne and paid by the public service companies, municipal corporations, State Highway Department, and Commonwealth of Pennsylvania in manner as follows, namely: The Commonwealth of Pennsylvania from special appropriation of \$200,000.00, made under the provisions of the Act of Assembly No. 419-A, approved July 25, 1917, sixteen hundred dollars (\$1,600.00); the County of Cambria, five hundred dollars (\$500.00); the Township of Allegheny, Cambria County, one hundred dollars (\$100.00); the Township of Cambria, Cambria County, fifteen hundred dollars (\$1,500.00); the Pennsylvania Railroad Company, forty-one hundred and fifty dollars (\$4,150.00); the balance of said cost and expense to be borne and paid by the State Highway Department of the Commonwealth of Pennsylvania.

All work in connection with the said abolition shall be done, as agreed by the parties, by the State Highway Department of the Commonwealth of Pennsylvania, in accordance with the aforesaid plans and specifications, and payment therefor in accordance with the above determination shall be made by the aforesaid parties to the State Highway Commissioner of Pennsylvania thirty days after the said Commissioner has notified them that the State Highway Department of the Commonwealth of Pennsylvania is ready to proceed with the work of the said abolition.

The Commission further finds and determines that a certificate of public convenience be issued, evidencing the Commission's ap-

proval of the abolition of the said crossings as hereinbefore determined.

ORDER.

Now, to wit, September 9, 1918, it is ordered: That a certificate of public convenience be issued evidencing the Commission's approval of the abolition of the above mentioned crossings at grade and the payment of the costs and expenses incident thereto in accordance with the above finding and determination of the Commission.

By the Commission,
WM. D. B. AINEY, *Chairman*.

L. J. HALL, ET AL., v. UNITED NATURAL GAS COMPANY.
Municipal contracts—Franchise ordinances—Duty of public service company.

In October, 1916, the Public Service Commission awarded a Certificate of Public Convenience approving an ordinance granted by the legal authorities of the Borough of Clarksville, Mercer County, Pa., securing the use of the streets of said borough to the United Natural Gas Company for the purpose of constructing its facilities to furnish natural gas to the inhabitants of the borough. The gas company failed to comply with and perform its agreement under such franchise; wherefore, it was ordered: That the United Natural Gas Company forthwith proceed to construct its service system in accordance with the terms of its contract with said borough.

COMPLAINT DOCKET No. 1894.

Order of the Commission.

Robert M. Gilkey, for complainant.

L. L. Graham, for respondent.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint of L. J. Hall and others, and answer thereto of the United Natural Gas Company, and it appearing therefrom that said company in October, 1916, secured from this Commission a certificate of public convenience approving an ordinance of the Borough of Clarksville, Mercer County, authorizing the construction in the streets of said borough of the facilities of said company, and that no steps have been taken by said company to construct the distribution system necessary to supply service in said borough:

Now, to wit, March 12, 1918, the United Natural Gas Company *is ordered* to forthwith proceed with the construction of a distribution system of lines in the Borough of Clarksville sufficient to render a reasonably adequate supply of natural gas to the inhabitants thereof in accordance with the terms of the contract between said company and the Borough of Clarksville, Mercer County, approved by this Commission on October 3, 1916.

By the Commission,

WM. D. B. AINEY, *Chairman.*

AMERICAN WINDOW GLASS CO. v. THE PENNSYLVANIA RAILROAD
CO. AND THE PITTSBURGH & LAKE ERIE RAILROAD CO.

*Rates—On sand—Alleged to be unreasonable and discriminatory
—Comparisons—Reparation.*

The complainant alleged that the rates of the respondents for the transportation of sand in carload lots was unreasonable and discriminatory and sought reparation in the sum of \$25,000. It was shown that the rate charged competitors of the complainant from the same shipping point to places more remote therefrom than the complainant's plant was the same, and in some instances less than that charged the complainant.

After due consideration, the Commission concluded:

1. That the complaint should be dismissed, in so far as it involved the rates of the Pennsylvania Railroad on glass sand from the Mapleton District to the Pittsburgh District.
2. That the joint rate of the two respondents of \$1.48 per ton was unreasonable for sand shipped from the Mapleton District to Bellevernon and should be reduced to \$1.42 per ton.
3. That the Pennsylvania Railroad should establish a rate not exceeding \$1.54 per ton for sand shipped from the Mapleton District to Kane, and that the former rate of \$1.68 per ton was unreasonable.
4. That rates fixed herein are subject to the general advances made since the complaint was filed.
5. That the matter of reparation would be decided after further hearings upon the subject.

COMPLAINT DOCKET No. 1708.

Report and Order of the Commission.

Richard Townsend, for complainant.

Frederick L. Ballard, for respondents.

AINEY, Chairman :

The complainant is a corporation engaged in the manufacture of window glass with plants located at Jeannette, Arnold, (New Kensington), Monongahela City and Kane, on the lines of the Pennsylvania Railroad Company, and at Bellevernon, on the lines of the Pittsburgh and Lake Erie Railroad Company, all in Pennsylvania and east of Pittsburgh.

In the manufacture of window glass, glass sand is chiefly used and is obtained by complainant from the so-called Mapleton district located in Huntingdon and Mifflin Counties.

By complaint filed September 24, 1917, the rates in effect for the transportation of glass sand in carload lots to the complainant's plants from Mapleton, McVeytown and Vineyard, (the Mapleton District), as contained in the Pennsylvania Railroad Company's tariff G. O.-P. S. C.-Pennsylvania, No. 967, and supplement No. 17 thereof, are subjected to attack. These rates are as follows:

To Kane,	\$1 68	per net ton
" Arnold (New Kensington),	1 32	" " "
" Jeannette,	1 32	" " "
" Monongahela City,	1 32	" " "
" Bellevernon (joint rate), ..	1 48	" " "

All these rates are for Pennsylvania Railroad delivery except the one applicable to Bellevernon which is for Pittsburgh and Lake Erie Railroad delivery and constitute a two-line haul, for which there is a joint rate (\$1.48) established for this particular service.

The charge is made that complainant's competitors, located at points west of Pittsburgh, namely, Rochester, Carnegie and Bridgeville in Pennsylvania, Steubenville, Ohio, and Wheeling, West Virginia, enjoy a rate of \$1.32 per net ton, from the same shipping points, although complainant's plants are located nearer these points of origin than are those of its competitors. It was asserted and argued that the disparity between the imposed rates and those mentioned for comparison subjected the tariff of the complainant to an unreasonable rate burden, to undue prejudice,

disadvantage and unlawful discrimination, and that the rates under attack are unjust, unreasonable, exorbitant, excessive, discriminatory and unduly prejudicial to the complainant.

The complainant contends that \$1.00 per net ton would be the just and reasonable rate to be imposed, and it seeks reparation on movements made for it for damages in the sum of about \$25,000.00.

The separate answers of the respondent carriers, admitting the existence of the rates attacked and their obligation as common carriers, deny all the other material allegations contained in the complaint, and particularly that the proposed rate of \$1.00 would be just and reasonable, or that the complainant is entitled to reparation.

It appears from an inspection of the respondents' tariffs on file with the Commission that the rates on glass, engine, moulding and building sand from Mapleton, McVeytown and Vineyard, as effective October 16, 1911, in tariff G. O.-P. S. C.-Pennsylvania, No. 20, to Arnold, Jeannette and Monongahela City to be \$1.25; to Bellevernon, \$1.85, and to Kane, \$1.60. To these rates was added five per centum, effective February 23, 1915, as published in tariff G. O.-P. S. C.-Pennsylvania, No. 967. The rates thus increased are those in effect on the date of the complaint with the exception that by supplement No. 5, the rate to Bellevernon was on January 1, 1916, reduced to \$1.48, and the rate to Kane was by supplement No. 6, on the fifteenth of the same month, as applicable to building and moulding sand, reduced to \$1.54, leaving the rate to that point for glass and engine sand \$1.68. The result of these changes was to establish a rate schedule as hereinbefore set forth, the one complained against.

The vein from which silica rock is taken, from which glass sand is obtained, has its northern origin in New York State and crosses the State of Pennsylvania in a southwesterly direction through Maryland into West Virginia; the Mapleton District thereof is about twenty miles in extent, located approximately seventy-five miles west of Harrisburg on the main line of the Pennsylvania Railroad, and includes, as principal shipping points, Mapleton, Vineyard, McVeytown and Newton-Hamilton. The silica rock is quarried and reduced to sand by process of grinding. Such sand is graded according to its fineness which determines

its use; No. 1 being used in the manufacture of tableware, No. 2 being used in the manufacture of window glass, and No. 3 is used as engine sand by the railroads.

All these grades of sand are over ninety-nine per centum pure silica and comprise seventy-five per centum of all the sand shipments from the Mapleton District. Moulding and building sand, constituting the balance of the output, is about sixty per cent. silica and forty per cent. loam. The glass sand is shipped in box cars. The complainant uses damp sand except during freezing weather when it must be artificially dried.

The plants of the complainant may be considered in three groups: first, those located in what is known as the Pittsburgh District, to wit, Arnold, Jeannette and Monongahela City, or lines of the Pennsylvania Railroad Company and about nineteen twenty-six and thirty-one miles, respectively, east of Pittsburgh; second, one at Belleverson, on the tracks of the Pittsburgh and Lake Erie Railroad Company, about forty-two miles southeast of Pittsburgh; third, one at Kane, located on the Pennsylvania Railroad, about one hundred and seventy-eight miles north of Pittsburgh. The miles given are the short line freight distances as filed by the respondents. The complaint may be considered in the light of the three aspects presented by these three groups.

FIRST, RATES TO PITTSBURGH DISTRICT.

(a) Discrimination. The gravamen of the complaint with respect to discrimination as affecting complainant's plants in the Pittsburgh District is, that because of the longer haul to the plants of other consumers of glass sand, located at points west of Pittsburgh at what are known as sixty per cent. points, with more costly terminal expense, all rendered for the same rate supplying to the complainant's plants from the Mapleton District, to wit, \$1.32 per ton, the complainant is discriminated against, it being complainant's contention that it does not enjoy a lower rate in consideration of the less expense to which the respondent is put in delivering glass sand from the same district.

With respect to the feature of the complaint involving movements to the Pittsburgh District which allege discrimination, the complainant contended on the authority of *Spartansburg Board of Trade v. Richmond & Danville Railroad Company, et al.*, 2 I. C. C. 193, that the burden of proof rested upon the respondents

to show a dissimilarity of circumstances upon a comparison with other and lesser rates for the movement of the same, or similar commodities to other localities, a contention not agreed to by the respondents. It is an established principle that in attacking a rate as unreasonable or discriminatory, comparisons made, in order to have weight, must be based on similar transportation circumstances: *Chamber of Commerce v. I. & G. N. Ry. Co.*, 32 I. C. C. 247, 251, in which case it was held: "When rates are alleged to be discriminatory, it must, of course, be shown that transportation conditions, under which the rates compared were established, are substantially similar."

This Commission is of the opinion that the rates complained against, being in effect at the time this complaint was filed, the burden of proof rested upon the complainant, but under all the evidence submitted, the same conclusion would be reached irrespective of a determination of that question. It was submitted to us by complainant that its "competitors, located a greater distance from the Mapleton District, must have no advantage or preference over the complainant": *Topeka Traffic Association v. A. & V. Ry. Co.*, 27 I. C. C. 428, 436. It was held in that case that the carrier "must view its rates as a whole and see to it that they effect no advantage or preference to one community over another which does not arise necessarily out of the transportation advantages which one has over the other." In seeking to apply this principle the complainant contends that the plants of its competitors in what is known in railroad parlance as the "sixty per cent. territory" in Pennsylvania are located an average distance of one hundred and seventy miles from the Mapleton District, and those in West Virginia and Ohio and at Rochester, Pennsylvania, over two hundred miles from the same district, while complainant's plants in the Pittsburgh District are about one hundred and sixty-six miles average distance. The exact distances, as taken from respondent's distance tariffs, and the applied rates on glass sand applicable thereto, from Vineyard, which is selected as a representative shipping point in the Mapleton District, are as follows:

To Arnold,	166 miles,	\$1 32 per ton
" Jeanette, Pa.,	143 "	1 32 " "
" Monon City, Pa., . .	191 "	1 32 " "
" Bellevernon,	201 "	1 48 " "

To Kane,	221	miles	1	68	per ton
<hr/>					
Average,	184				
" Bridgeville, Pa., ...	181	"	1	32	" "
" Carnegie, Pa.,	177	"	1	32	" "
" Rochester, Pa.,	193	"	1	32	" "
" Steubenville, O., ...	212	"	1	32	" "
" Wheeling, W. Va., .	235	"	1	32	" "

It was shown by complainant that the terminal services at the plants of the so-called competitors were more expensive than those performed at complainant's plants, and that the latter had better facilities for unloading sand, thereby expediting the release of cars as against some delay at the plants of its competitors. The respondents maintained and gave evidence to establish that the disparity in rates was the result of a competitive situation on sand movements from Michigan.

The history of the rates on glass sand from the Mapleton District to the sixty per cent. points was shown, and it is briefly summarized as follows: "Prior to 1904, \$1.56 per ton; 1904 to 1909, \$1.40; 1909 to 1915, \$1.25; since 1915, (5% increase), \$1.32, and clearly established that the reductions to \$1.40 and \$1.25 were made to meet the transportation competition in the first instance from the vicinity of Toledo, and in the second instance from Rockwood, Michigan. In the nature of a rejoinder to this contention of respondents, it was urged that the competition from Michigan did not justify the alleged discrimination, and our attention was directed to the case of *Wight v. U. S.*, 167 U. S. 512. A brief reference to that case is sufficient to show its inapplicability to the case at bar, since the drayage performed at destination for the one consignee, or the rebate allowed therefor, without similar service to the other receiver, or a like allowance, were services and allowances which could and ought to have been made to both receivers. In the case before us, the complainant is not charging inadequate service, nor would it be possible to perform for the complainant the additional road haul, or the more extensive terminal service now being rendered to and at the points in the sixty per cent. territory. As to the further contention by the complainant that the competition is between the

producers of glass sand and not between the carriers, it was deduced by it that the reductions in rates to the sixty per cent. points were made by respondents upon the request of shippers of glass sand in the Mapleton District, and therefore were not the result of genuine competition between the carriers such as to bring the matter within the purview of the decision of the court in *I. C. C. v. C. G. W. R. Co.*, 209 U. S. 108, where it was held that carriers in fixing the amount of freight rates "may take into such account competition with other carriers provided such competition is genuine." A letter of respondent was introduced in evidence (Exhibit No. 5), which was written to the shippers at the time of the reduction of rates to the sixty per cent. points, a paragraph from which is quoted:

"This has been done because of the rates in effect from Michigan points, but I confess I only make this reduction in order that our interests may be protected at the points of destination named, and if the rates from Michigan points should be advanced, I would expect to advance these rates at the same time, so that I cannot say how long they will be in effect, my efforts being to see that the Michigan rates are advanced."

It is apparent that the respondent's purpose in reducing the rates to the sixty per cent. points was to secure a share of the glass sand traffic which would otherwise move from Michigan points. Such was the result for the testimony established that about five hundred and ten cars per year were moved under these reduced rates, although but four cars during two representative months were shipped from the Mapleton District to manufacturers in the sixty per cent. territory west of Pittsburgh, designated by complainant as competitive points. We are bound, therefore, to conclude that the carrier faced real and substantial competition.

It is not, however, sufficient for us to stop with this determination. The competitive situation which faced the carrier may have been real and substantial and yet have produced a discriminatory situation working an injustice to the present complainant: *I. C. C. v. C. G. W. Ry. Co.*, 209 U. S. 122; *Consumers Co. v. C. & N. W. Ry. Co.*, 36 I. C. C. 259. These cases, with others of similar import which might be cited, require us to make inquiry to determine whether the rates imposed by the carriers to the

sixty per cent. points worked an undue preference or created an unlawful discrimination to the prejudice of the complainant.

We are unable to find that the complainant has suffered any damage, pecuniary or otherwise, caused by the maintenance by the respondents of rates to the sixty per cent. points on a different level from those applicable to complainant's plants in the Pittsburgh District. The complainant was ignorant of any movement of sand from the Mapleton District to these alleged competitive points, a situation hardly compatible with any substantial injury to which it was being subjected by reason of the difference in rates, a point which may be properly emphasized in the light of the limited number of so-called competitive car movements, only four cars in two representative months.

If we may assume in passing that the long established rates in the Pittsburgh District are reasonable, the solution of the alleged discriminatory situation, in view of the history of the rates to the sixty per cent. points from the Mapleton District, would be to re-establish the relationship existing prior to the changes made to meet the competition from Michigan. That, however, would result in no benefit to the complainant, or charge in the competitive situation, since the manufacturers within the sixty per cent. points would avail themselves of the rate from Rockwood, Michigan, which at the time of the filing of this complaint was \$1.26 per ton, and it would follow that the traffic from the Mapleton District to the sixty per cent. points would be lost to the respondents. We are, therefore, unable to find from the evidence that the rates to the sixty per cent. points worked an unjust discrimination or created an undue and unreasonable preference as against the complainant's plants located in the Pittsburgh District.

Although there was no specific charge made in the complaint that glass sand rates generally are not accorded proper classification, the matter was dwelt upon at quite some length in complainant's brief. In this connection, and to support this contention our attention was directed to Metropolitan Paving Brick Company v. Ann Arbor Railroad, 17 I. C. C. 197, where it was held that no transportation reason existed why different grades of fire, building and paving brick should take different rates. The matter principally considered was the difference in rates as applied to varying grades of fire brick. The Commission therein

followed *Stowe-Fuller Company v. Pennsylvania Company*, 12 I. C. C. 216, 220, where it was held:

"The brick themselves are so nearly alike in color that, being the same size and of the same weight, they are practically indistinguishable the one from the other. To make different rates on each of these brick is virtually to permit the shipper to declare which of the three rates he chooses to impose upon the freight. * * *

"Aside from the difficulty in learning what use the brick were to be put to upon reaching destination, we cannot regard a classification as scientific, or a difference in rates as well based, which is altogether founded upon a distinction that has no transportation significance."

In the case before us it does not appear that the same difficulty of identification exists as in the brick case. There are transportation differences as between glass sand on the one hand, and moulding and building sand on the other. There appears a difference as to the kind of car required for transportation, and in the preparation of the car to receive the glass sand, and there are also material differences in value of the commodities carried. It has been clearly settled by administrative decision that a classification dependent upon the use to which a commodity is put is improper: *Catoosa v. W. & A. Ry. Co.*, 38 I. C. C. 614, a case where carriers had in effect a lower rate on crushed limestone when used for fluxing purposes than when devoted to other uses. Glass sand, so termed, defines a material widely and substantially different from moulding sand and building sand, both with respect to the ingredients and the method of preparing for the market. While the word "glass," as used in designating this commodity, implies the use to which the material is put, it does not follow, nor does it appear to be the fact, that the transportation rates are based upon its use in the manufacture of glass.

There is, however, no difference between the rates on the various kinds of sand from the Mapleton District to complainant's plants, except to the plant at Kane, and as to these latter rates they will be hereafter considered in this report.

The complainant insists that glass sand is a raw material as its transportation to the complainant's plants results in future transportation of the finished product of window glass, and that

this raw material should move at a low rate for the reason that the transportation of the finished product contributes a share of the transportation costs. While this, if true, is ground for some differentiation in rates, for instance in coal moving to a dealer and the same commodity moved to an industry which furnishes for further transportation a product resulting from the use of that coal in manufacture. There are substantial factors to be taken into consideration in applying this principle, none of which appear in the instant case, and the proposition, therefore, seems to be controlled by the decision of the Pennsylvania Superior Court in *Baltimore & Ohio Railroad Company v. The Public Service Commission*, 68 Pa. Superior Ct. 503, where it was held "The Public Service Commission has not found as a fact, supported by evidence, that the carrier railroads have been and are being paid a just and reasonable compensation for the disposition of the slag, by reason of any peculiarly favorable rate charged for the incoming and outgoing freight of complainant companies."

(b) Reasonableness. To sustain the charge of the unreasonableness of the rates under attack, the complainant relied in part upon a comparison with rates on the same commodity to points west of Pittsburgh already adverted to in considering the question of discrimination. They also submitted a comparison with rates on brick, limestone, etc., and with sixth class rates and they further assert that the rates are unreasonable per se. Each of these three propositions have been examined in the light of testimony and decision.

(1) Comparison with the rates to points west of Pittsburgh. On the question of their reasonableness, the rates from the Mapleton District to complainant's plants in the Pittsburgh District are made the subject of comparison with rates from the same points of origin to points west of Pittsburgh in what is known in railroad parlance, and has been heretofore adverted to as sixty per cent. territory. It was shown that the road haul to the sixty per cent. points, with which the complainant claims to be in competition, is greater than to its plants in the Pittsburgh District, and that the terminal facilities which are performed by the respondents at its competitor's plants are more costly than those performed at the complainant's plants. It already appears in our conclusion under another feature of the case, that the rates here

offered for comparison were made because of competitive conditions between railroads to meet the rates to the sixty per cent. territory.

No principle is more firmly established than that rates influenced by competitive conditions cannot properly be taken as a standard by which to judge rates not subject to similar influences: *Rainey and Rogers v. St. L. & S. F. R. R. Co.*, 18 I. C. C. 89; *North Carolina v. N. & W. Ry. Co.*, 19 I. C. C. 303; *Florida Cotton Oil Co. v. C. G. Ry. Co.*, 19 I. C. C. 336; *South Western Traffic Association v. A., T. & S. F. Ry. Co.*, 24 I. C. C. 570; *Edwards and Bradford Lumber Company v. C., B. & Q. R. R. Co.*, 25 I. C. C. 93; *American Beet Sugar Company v. S. P. Co.*, 41 I. C. C. 631; *Export Grain from Colorado*, 42 I. C. C. 114; *L. & N. R. R. v. Interstate Commerce Commission*, 195 Fed. Rep. 541; *L. & R. R. Co. v. United States*, 238 U. S. 1.

Having reached the conclusion that the transportation competition from Michigan and other points was genuine, and that the rates to the sixty per cent. points from the Mapleton District did not result in an unlawful discrimination against the plants of the complainant located in the Pittsburgh District, it necessarily followed, under the authorities cited, that these competitively established rates cannot be accepted as standards by which to measure the reasonableness of the rates under attack. Comparisons under such conditions are of little value for they present dissimilar circumstances and conditions: *Pacific Creamery Co. v. S. P. Co.*, 34 I. C. C. 586; *Eastern Live Stock Co.*, 36 I. C. C. 675.

(2) Comparison with rates on brick, limestone and sixth class rates. According to the evidence, the rate on brick from Mt. Union, which is in the Mapleton glass sand district, to Pittsburgh points is \$1.32 per ton. In comparing this rate with the rate on glass sand, the complainant uses an average carload weight for brick of 30.3 tons as against the average weight of actual shipments of glass sand made to its plants of 39.2 tons. It was argued therefrom that the rates on glass sand are excessive since car-mile earnings on this basis are higher on glass sand than on brick. The car weight used for brick was arrived at by dividing the average net revenue per loaded car-mile by the average net revenue per ton-mile as shown in the Five Per Cent. Case, 31 I. C. C. 416.

By using the average distance to complainant's plants from the Mapleton District of one hundred and sixty-six miles, the car-mile earnings on brick would be twenty-four cents, and on glass sand thirty-one cents. The average weight for brick submitted by complainant is taken from a tabulation of earnings compiled from the Interstate Commerce Commission from statements received from sixty-nine carriers in official classification territory for use in the Five Per Cent. case. That table shows brick, stone, etc., three hundred and four carloads, average haul sixty-six miles, average net revenue twenty-two cents per loaded car-mile, 7.27 mills per ton-mile. An average arrived at in this manner, the result of varying rates for varying distances in a wide territory under varying conditions of transportation, cannot be assumed as portraying actual conditions when compared to the loading of actual shipments at a rate between definite points. Both sand and brick easily load to the carrying capacity of the cars, although respondent's witnesses testified that brick loads more heavily than glass sand. Both commodities are carried in box cars, but glass sand requires tight cars to prevent leakage and contamination from cinders or other foreign substances which is not necessary for brick. Brick "shipments fill the cars to a maximum load of ten per cent. above marked capacity": Stowe-Fuller Company, 12 I. C. C. 219.

The rate on fluxing limestone from Bellefonte to the Pittsburgh District is sixty-eight cents per ton of 2,240 pounds. To make this rate comparable with glass sand, because fluxing limestone is shipped in gondola cars whereas glass sand is shipped in box cars, the complainant arbitrarily added thereto fifteen per cent. which resulted in a hypothetical rate of seventy-nine cents per 2,240 pounds. The rate of \$1.32 on glass sand to the complainant's plants is on this basis held by it to be unreasonable when compared with this hypothetical rate on fluxing limestone. Objecting to the limestone rate as a proper basis for comparison, the respondent calls attention to the fact that fluxing limestone is the crudest of raw materials and vital to the iron industry of the Commonwealth; it is transported in hopper cars, loading upwards of fifty tons per car, and with respect to value, risk, equipment, loading, commercial consideration and railroad and public policy, there is a wide dissimilarity between the two commodities.

The freight distance from Bellefonte to Pittsburgh is one hundred and sixty-four miles. The rate of sixty-eight cents per gross ton carries with it a minimum weight of 100,000 pounds, but not to exceed the capacity of the car used.

Sixth class rates from the Mapleton District are to the Pittsburgh District fourteen and one-half cents, and to the sixty per cent. territory, fifteen cents. Because of this it is suggested that a small spread should exist between the rates on sand to these same districts.

None of the three suggested standards of comparison present sufficiently similar conditions to make them serviceable in the determination of the question of what is a reasonable rate.

(3) Rates unreasonable per se. That the rates under attack have been in effect for years on the same or upon a higher level than at present, except for the general increase of five per cent. in the year 1915, unaffected by the fifteen per cent. increase in 1917, is urged by respondent as establishing presumably the reasonableness of these rates against which the complainant contends that the presumption failed because of the rates now in effect became actively operative only within the past two years since the sand supplied at complainant's quarries at Derry had failed.

Referring briefly again to the history of these rates to the Pittsburgh District, it is observed that in the year 1894, the rate was established at \$1.45 per net ton. In 1900, at \$1.25, and in 1915, by the five per cent. increase, \$1.32. It would, therefore, appear that the \$1.25 rate, except as affected by the five per cent. increase, has been in effect for seventeen years. While there is no direct evidence as to the traffic prior to the year 1917, respondent's Exhibit No. 2, showing the tonnage of glass sand in the Mapleton District during two representative months in that year, showed shipments were made to seventeen points in the Pittsburgh District other than to complainant's delivery. The tonnage for this period to the entire Pittsburgh District was 12,894. To the plants of complainant in that district, 6,465 tons, leaving the difference attributable to other consignees, 6,429 tons. With these figures as a basis for computation, it would not be an unreasonable estimate to assume that plants other than complainant's in the Pittsburgh District have been receiving approximately one thousand carloads per year under the rates herein

objected to. The glass industry in the Pittsburgh District appears to have grown and prospered under the present rates, and is one of the largest of its kind. The bulk of the glass sand therein utilized is obtained from the Mapleton District, the only available source of supply in Pennsylvania. The commodity has freely moved under the rates complained against, and the complainant's business has increased and the value of its product doubled.

In fact, glass sand moves freely from the Mapleton District to points more distant, and at rates substantially higher than to the Pittsburgh District, all of which are facts properly to be considered by the Commission in determining the reasonableness and propriety of the existing rates: *West Virginia Pulp & Paper Company v. P. R. R., P. U. R.* 1915-D, 11, 16; 3 P. C. R. 673, where the Commission in its opinion took into consideration the fact that "the complainants do not contend that their business will be vitally or even seriously affected by the increase," a factor which the Interstate Commerce Commission considered in determining the reasonableness of a rate: *Transportation of Wool, Hides and Pelts*, 23 I. C. C. 151. The prosperity of a particular industry or locality would, of course, in and of itself not justify an increase in rates to insure to the carrier a participation in the results flowing therefrom. On the other hand, where rates have continued for the period of time of those under attack, and industries dependent thereon have thrived and prospered thereunder, it furnishes some basis for the refusal of the Commission to strike down such rates. As a method of determining the reasonableness of the rates, considerable evidence was introduced concerning the ton-mile earnings and car-mile earnings using the freight distance of the respondents and the average loading of 39.2 tons as submitted by the complainant. The following table results:

Rates per Net Ton on Glass Sand from Vineyard.

<i>To</i>	<i>Rate</i>	<i>Miles</i>	<i>Rate per Ton-Mile</i>	<i>Revenue per Car-Mile</i>
Jeannette,	\$1 32	143	9.2 miles	36 cents
Monon City,	1 32	191	6.9 miles	27 cents
Arnold,	1 32	166	8. miles	31 cents
<hr/>				
Average,	\$1 32	166	8 miles	31 cents

Comparison was made between the results as shown in this table with the average ton-mile earnings as given in the Five Per Cent. case, *supra*, which shows the average ton-mile earnings on sand to be 3.34 mills and the car-mile earnings on sand from Steiner, Michigan, at about eighteen cents. The average car-mile earnings on all freight for all railroads in the eastern district as shown in that case was 15.79 cents. The latter figure was arrived at by adding to the amount in the Interstate Commerce Commission's report, three and one-half per centum for switching charges and arbitraries.

The table in the Five Per Cent. Case, 31 I. C. C. 416, compiled from statements submitted by sixty-nine carriers in official classification territory show for sand, gravel, etc., fifty-seven carloads, average haul one hundred and thirty-two miles, average net revenue thirteen cents per loaded car-mile, 3.34 mills per ton-mile, and we cannot, from the averages there submitted, find any basis upon which to apply them. The varying distances in a wide territory under varying conditions of transportation cannot be assumed as furnishing a safe or satisfactory standard by which to determine the reasonableness of rates between definite points. We were furnished with evidence concerning the car-mile earnings on sand from Steiner, Michigan, to points in Pennsylvania where the plants of complainant were located, the mileage being given as follows: To Bellevernon, 331 miles; Jeannette, 315.7 miles; Arnold, 308.1 miles; Monongahela, 319.9 miles; New Kensington, 307.3, all upwards of three hundred miles, whereas the average distance to complainant's plants from the Mapleton District is but one hundred and sixty-six miles. It is a rate principle generally recognized that the earnings per mile decrease with the increase in distance. Comparison with average earnings on all freight for all carriers in the eastern district, while to some extent of interest, is generally recognized as not at all conclusive: *Ontario Iron Ore Co. v. N. Y. C. R. R. Co.*, 30 I. C. C. 569.

As pointed out elsewhere in this report, glass sand requires tight box cars to protect the glass sand from dirt and leakage, and when dry sand is shipped from moisture, while ordinary varieties of sand and crushed stone do not require the same type of car or the shipments to be made under similar conditions. There is no inbound traffic to supply empty cars for the glass sand, and

for that reason empty cars must be brought from Harrisburg to the Mapleton District, a distance of about seventy-five miles. This is an element to be considered as bearing upon the reasonableness of the rate.

It appears that in 1886 and 1889, glass sand sold at the quarry for sixty cents; that at the time of the hearing the cost of wet sand was \$1.25, and dry sand, \$1.60. Comparisons were submitted as to rates on sand and crushed stone, bulk wood, pig iron and somewhat similar commodities moving under the sixth class rates. The character of these commodities, or the circumstances under which they were moved, do not appear to be of sufficient evidentiary value to require us to further prolong this report by an extended reference thereto.

A "simplified method" by which a basis for determining reasonable rates was suggested by complainant. It is based upon the theory that the rate is composed of two elements, a terminal charge and a charge for the road haul. It has as its foundation the so-called MacGraham scale and under the simplified method suggested by the complainant is based on a terminal represented by three hundred miles and a road haul of two and one-quarter mills, each of these factors arbitrarily chosen. The MacGraham scale principle cannot here be properly applied. It may be used in fixing the relationship of rates in the Central Freight Association territory as between localities, but it has no relation to the level or measure of freight rates. The difficulty with its application is that its formula when reduced to definite terms is based upon two assumptions, one of a terminal mileage equivalent, and the other a mileage for actual road haul. In practical experience it has been applied only to the relationship of long distance rates, the shortest, as we are advised, being four hundred and sixty-six miles from New York to Pittsburgh. The complainant did not adopt the terminal employed in the construction of the MacGraham scale. If it had the rate result would have been higher than those under attack for the terminal therein used is six cents per one hundred pounds equal to \$1.20 per ton to which would be added a charge for road haul. The terminal which the complainant would employ under the suggested "simplified method" amounts to 67.5 cents per ton, and the road haul two and one-quarter mills per ton per mile. These figures are of entirely arbitrary

trary selection and apparently made to secure a result equaling the rates from Steiner, Michigan. In fact, that is the explained basis. It would, therefore, appear that in the final analysis, the suggested MacGraham scale and the simplified method stand upon the competitive rates already referred to and not accepted as a basis for comparison.

Under all the evidence, the Commission is unable to find that the rates on glass sand from the Mapleton District to complainant's plants in the Pittsburgh District are unjust or unreasonable.

Second, Rates to Bellevernon.

Bellevernon is located on the Pittsburgh and Lake Erie Railroad thirty-five miles southeast of Homestead, the junction with the Pennsylvania Railroad, and two hundred and one miles from Mapleton. In the year 1911, the rate to Bellevernon from the Mapleton District was \$1.85 per net ton, increased in 1915 by the five per cent. order to \$1.94. On January 1, 1915, the rate was reduced to \$1.48 which is the rate here attacked.

The complainant contends that the spread of sixteen cents per ton between this two line rate and the one line rate of \$1.32 into the Pittsburgh District is too great, pointing out that the spread in the rate to Trenton, N. J., is but six cents, and that this Commission in *Dexter-Portland Cement Company v. L. V. R. R.*, 2 P. C. R. 447, allowed a spread of but ten cents. The rate on glass sand to Glassport on the Pittsburgh & Lake Erie Railroad, located directly intermediate to Bellevernon and twenty-four miles nearer the Mapleton District, is \$1.32. On the other hand, it is pointed out that the Bellevernon rate yields the same revenue per ton-mile, i. e., 7.7 mills as the average haul to the Pittsburgh District, yet it involves a two-line haul. The rate is apportioned, thirty cents to the P. & L. E. R. R. R., and \$1.18 to the Pennsylvania Railroad.

The principle of a somewhat higher rate being allowed for a two-line haul over the rate for a one-line haul is well established. The amount of that difference is not arbitrarily fixed, but is dependent upon the circumstances presented in each case.

In view of all the facts and circumstances, we are of the opinion that the spread in this case should not exceed ten cents per ton. We conclude, therefore, that a rate not exceeding \$1.42 on glass sand from the Mapleton District to Bellevernon is reasona-

ble, and that the higher and imposed rate of \$1.48 is unjust and unreasonable.

Third, Rates to Kane.

Kane is located two hundred and twenty-one miles from the Mapleton District about one hundred and seventy-eight miles northeast of Pittsburgh. Prior to the year 1911, the rate on glass sand from Mapleton District to this point was \$1.80 per net ton. On October 16, 1911, this rate was reduced to \$1.60, and subsequently on February 23, 1915, was increased by the five per cent. advance to \$1.68 which is the rate against which the present complaint is directed. On moulding and building sand the rate is \$1.54 per net ton between the same points. It was charged that the rate of \$1.68 on glass sand when compared with the rate on moulding sand between the same points, and when considered in connection with the rate on brick of \$1.58 from Mt. Union in the Mapleton District is discriminatory and exorbitant.

A comparison was presented between the per ton-mile revenue of 7.6 mills which the Kane rate yields with the average to the Pittsburgh District of 7.7 mills, and a comparison of rates, distances and movements for two representative months was submitted, as follows:

<i>To</i>	<i>Miles</i>	<i>Rate</i>	<i>Cars Shown on Exhibit 2</i>
Kane,	221	\$1 68	20
Sergeant,	217	1 68	9
James City,	225	1 68	8
Wilcox,	212	1 68	3
Camden, N. J.,	219*	1 68	1
Trenton, N. J.,	211	1 78	32

To supply the Kane plant, the complainant secured glass sand from St. Marys and Daguscahonda at 57.8 cents, and sixty cents per ton respectively, and it is urged by respondents that should the rate from Mapleton to Kane be reduced, it would still be to the complainant's advantage to procure the sand from the present sources of supply, except when a particular quality originating in

*This figure includes a constructive distance of twenty miles for the movement from Franklin Junction to Fish House Junction over the Delaware river bridge.

the Mapleton District is required. The respondent's tariffs make no difference in the rates on glass sand, moulding sand and building sand from the Mapleton District to the Pittsburgh District. The several kinds of sand therein carry the same rates. The situation is somewhat different, however, in the rates to Kane where glass sand is \$1.68, while moulding and building sand is \$1.54 per ton. This furnishes the only instance called to our attention where such differences exist, except in rates to Canadian points. In all other instances the same rate applies on all sand from the Mapleton District. The rates to distances comparable to the mileage to Kane, submitted by respondents, show two points, Sergeant and Wilcox, which are not specifically shown in the tariff of sand rates and are subject to the same rates as published to Kane, because of being directly intermediate. In other words, the rate published to Kane cannot be exceeded to Sergeant and Wilcox and in the absence of a lower rate, then the \$1.68 rate to Kane would apply to the intermediate points. James City is four miles more distant than Kane, is located on the Kane and Elk Railroad involving a two line haul. Camden and Trenton, N. J., are in an entirely different territory, and information concerning the traffic conditions to these points is not given. It is evident from the record that the complainant is not greatly interested in the rate to Kane from the Mapleton District, unless it should be made so low that it would be more advantageous to draw its supply from that district. We are of the opinion that the rate on glass sand should not exceed the rate concurrently in effect on other grades of sand shipped from the Mapleton District, to wit, \$1.54 per ton, which we determine to be a just and reasonable rate, and that the imposed rate of \$1.68 is unjust and unreasonable.

A comparative statement is herewith submitted, showing distances, rates present and proposed the ton-mile and car-mile revenue which is helpful in showing graphically the consistent decrease in ton-mile and car-mile revenue with the increase in distance.

The Bellevernon and Kane rates as complained against are not in harmony with this principle. The proposed rates to these two points will rectify that discrepancy.

Comparative Statement of Present and Proposed Rates on Glass Sand.

<i>To</i>	<i>Miles</i>	<i>Rates</i>	<i>Mills per ton-mile</i>	<i>Cents per car-mile*</i>
Jeannette,	143	\$1 32	9.2	36
New Kensington,	166	1 32	8.	31
Glassport,	177	1 32	7.5	29
Monongahela City,	191	1 32	6.9	27
Bellevernon—Present, ...	201	1 48	7.7	30
Proposed,		1 42	7.1	28
Kane, Present,	221	1 68	7.6	30
Proposed,		1 54	6.9	27

*Carload of 39.2 tons used.

REPARATION.

Under the foregoing conclusions, the only rates changed are those to Bellevernon and Kane. The record shows no shipments were made to Bellevernon in the two years preceding the date of complaint. A few cars moved to Kane, but as to which, if complainant and respondent cannot agree, a further hearing will be fixed for the purpose of ascertaining the extent of these shipments, and whether complainant was damaged by the imposed rates.

CONCLUSION.

First: The complaint, in so far as it affects the Pennsylvania Railroad Company's rates on glass sand from the Mapleton District to points in the Pittsburgh District, should be dismissed.

Second: The Pennsylvania Railroad Company and the Pittsburgh & Lake Erie Railroad Company should establish a joint rate on glass sand from the Mapleton District to Bellevernon, not exceeding \$1.42 per net ton, superseding the joint rate of \$1.48 found to be unreasonable.

Third: The Pennsylvania Railroad Company should establish a rate from the Mapleton District to Kane, not exceeding \$1.54 per net ton, superseding the rate between the same points found to be unreasonable.

Fourth: The rates herein fixed and determined to be subject to such general advances as have been permitted or made since the filing of the complaint.

Fifth: Further hearing to be had for the purpose of determining damages, if any, which complainant has sustained, as a basis for an order of reparation.

An order will be made accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, October 22, 1918, It is ordered: That the complaint in this case so far as it affects the Pennsylvania Railroad Company's rates on glass sand from the Mapleton District to points in the Pittsburgh District be, and the same is hereby dismissed;

It is further ordered: That the respondents, the Pennsylvania Railroad Company and the Pittsburgh & Lake Erie Railroad Company, establish a joint rate on glass sand from the Mapleton District to Bellevernon not exceeding \$1.42 per net ton, superseding the joint rate of \$1.48 per net ton which is hereby found to be unreasonable;

It is further ordered: That the Pennsylvania Railroad Company establish a rate from the Mapleton District to Kane, Pennsylvania, not exceeding \$1.54 per net ton, superseding the rate now in force between the same points which is hereby found unreasonable;

It is further ordered: That the rates herein fixed and determined are subject to such general advances as have been permitted or made since the complaint in this case was filed.

It is further ordered: That jurisdiction of this complaint is retained by the Commission for the purpose of determining the amount of damages, if any, which the complainant has sustained by reason of the collection of charges for transportation of glass sand under rates found by the Commission to be unreasonable, as a basis of an order for reparation.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF BOROUGH OF HOOVERSVILLE.

Municipal electric plant—Condemnation of property of public service company.

A borough may condemn and acquire the transmission system, transformers, poles, wires, etc., of a public service company for the purpose of lighting the streets of said borough, and for supplying electric current to the public, without taking over that part of the system which lies beyond the borough limits.

It appearing, in the present instance, that the acquisition of the electrical system was necessary and proper for the service, accommodation, convenience, and safety of the public, the Commission approved of the same and ordered that a certificate of public convenience be issued.

APPLICATION DOCKET No. 887—1917.

Report and Order of the Commission.

C. L. Shaver, for applicant.

AINEY, Chairman:

We have before us in this proceeding the application of the Borough of Hooversville, Somerset County, Pennsylvania, for a certificate of public convenience evidencing the Commission's approval of and consent to the acquisition by it of the electric transmission system by which the borough has heretofore been served, belonging to the United Light, Heat and Power Company.

It is proposed by the applicant to take over all of the light company's system located within the borough, and also, if necessary, that portion of the system outside the borough extending from the borough line to Shaffer schoolhouse in Quemahoning Township.

The United Light, Heat and Power Company filed a protest against the proposed municipal acquisition, and, in addition to its general objection to the granting of any certificate of public convenience, it urged that if it (the borough) were permitted to acquire the portion of the lines and system within the municipal confines, it should be compelled to take the connecting lines by which service is rendered to the borough, including those extending from

Shaffer schoolhouse to Stoyestown Borough, the protestant's position in this respect being that these outside lines were a part of the Hooversville lighting system erected and maintained for that purpose, and which would be of no use to respondent if separated. The right of the applicant, by proceedings before this Commission, to condemn the property of the protestant was challenged, and it was claimed that the Commission was without authority in law to fix a value upon protestant's property sought to be acquired, thereby depriving, as it was claimed, protestant of the right of having this matter determined in the courts and a trial by jury.

At a hearing before the Commission, the applicant and protestant, reserving all legal rights under the issues thus raised, for the purpose of expediting the proceedings, agreed that an inventory and valuation of the lines and system of protestant, in so far as they were involved in this case, should be made and determined by experts in conference. Under this agreement the applicant and protestant each selected an expert and these two with a member of the staff of the Bureau of Engineering of this Commission were constituted an engineering conference. Acting under the authority and by the agreement of the parties interested, they made an inventory and appraisal of the property in question, determined its reproduction value upon a fair basis, including therein all items for physical property and the indirect or overhead costs, and they deducted therefrom the depreciation which they found had accrued. From this they arrived at and agreed upon the fair value of the property, subject to the decision of the Commission as to what portion or portions of protestant's property should be acquired.

The results of their labors, including the inventory, appraisal and fair value as they found it, were presented to the Commission in the form of a report unanimously agreed upon and signed by all of the members of the engineering conference.

This report was later offered in evidence and supported by the testimony of two of the engineers who made it. There appears to be no controversy whatever as to the accuracy of the inventory thus made or as to the fair value of the property under consideration. More easily to determine the questions involved, the engineering conference separated the property into three parts, the

first being the property of protestant in the Borough of Hooversville for which they found the reproduction cost new less accrued depreciation to be \$5,025.52, and the fair value for borough acquisition to be \$5,026.00. Second, the property of protestant from Hooversville to Shaffer schoolhouse for which they found the reproduction cost new less accrued depreciation to be \$1,062.96, with a fair value for acquisition \$1,063.00. Third, the property of protestant from Shaffer schoolhouse to Stoyestown for which they found the reproduction cost new less accrued depreciation to be \$2,239.95, and of a fair value for acquisition purpose of \$2,240.00. Totaling these items the reproduction cost new less accrued depreciation is \$8,328.43, and the fair value for acquisition \$8,329.00.

At the hearing it developed that subsequently to the taking of the inventory and therefore not included in the appraisal or figures above stated, the protestant had made certain expenditures for which allowances were claimed. These additional items were as follows: For new construction within the Borough of Hooversville \$312.02, and for replacements therein \$127.23. For replacements on the line between Shaffer schoolhouse and the substation at Stoyestown \$64.70.

At the hearing it was shown that the Borough of Hooversville, on December 9, 1908, passed a franchise ordinance by which there was granted to J. E. Morgret, his heirs and assigns, the right to construct, maintain and operate an electric light and power system within the Borough of Hooversville for the term of forty years. The ordinance carried certain conditions with respect to free service for lighting certain municipal and other public buildings, and fixed the rates of charges for municipal and other lighting purposes for the period of the life of the ordinance. About 1909 the rights of Morgret under his ordinance were acquired by the Hooversville Light, Heat and Power Company and later that company was merged with the Stoyestown Light, Heat and Power Company and the Quemahoning Light, Heat and Power Company becoming the United Light, Heat and Power Company, the present protestant. It was submitted that the engineering conference did not take into consideration or fix any value for the franchise rights originally granted to Morgret and which the protestant had acquired. The protestant claimed that it was en-

titled to an allowance therefor. Witnesses produced variously estimated the value of this franchise right from \$200.00 to \$1,000.00. The applicant maintained that no allowance should be made.

Prior to the merger of the three constituent companies of the protestant, the Hooversville Light, Heat and Power Company purchased the current which it supplied from the Stoyestown Light, Heat and Power Company, and in order to secure the same a feed line was constructed from Stoyestown to the borough line at Hooversville, a distance of about five and a half miles, that portion of it from Shaffer schoolhouse to the borough line being built exclusively for Hooversville service. Subsequently to the merger, about 1913, the United Light, Heat and Power Company ceased to manufacture electricity and thereafter purchased its supply from the Penn Electric Service Company, the delivery point being the substation erected at Stoyestown. From this source the United Light, Heat and Power Company has since supplied the Borough of Hooversville over the feed line mentioned. Along the route between the Stoyestown substation and the Borough of Hooversville the protestant has six customers who pay a monthly rate of \$9.50. In the Borough of Hooversville there are two hundred and four customers exclusive of the borough in its strictly municipal capacity.

It is the purpose of the Borough of Hooversville, if and when this application is approved, to purchase its supply from the Penn Electric Service Company whose transmission lines pass within a few rods of the borough limits.

The portion of the protestant's line from the borough limits to the residence of J. C. Shaffer, known as the Shaffer schoolhouse, is about four hundred and twelve rods in length. There are no patrons along it. Should the municipality acquire the transmission lines of the protestant within the municipality, the lines from the borough limits to Shaffer schoolhouse, and more particularly from the schoolhouse to Stoyestown substation, would be of little or no use to it. The borough raises, however, no particular objection to taking over and paying for that part of the line extending to the schoolhouse, but strongly objects to acquiring the line from the schoolhouse to the substation. On the contrary the protestant is equally insistent that if the borough be permitted to

obtain the lines within the municipal limits it must be required to include in its capture the lines outside the borough to the substation along which it is now supplying in Quemahoning Township six customers with lights. Here lies the principal difficulty.

Passing to another feature of the case, it appears that the Borough of Hooversville had a population in April, 1918, of twelve hundred and ninety-seven. The total assessed valuation of its property for the same year was \$186,965.00. Its outstanding indebtedness is \$2,100.00, permitting it, on a seven per cent. basis, to create a municipal indebtedness of upwards of \$13,000.00. If against this amount there were deducted the outstanding indebtedness which was found to be \$2,100.00, the borough's borrowing capacity would be above any amount which would be required to finance the acquisition of the property of protestant under any theory of the case presented. This was conceded at argument, the protestant's brief concluding "under the facts in this case the petitioner apparently is entitled to a certificate of public convenience."

We conclude then, first, that the acquisition by the Borough of Hooversville of the transmission lines of protestant within the Borough of Hooversville or within its limits and extending to the Shaffer schoolhouse or within its limits and extending to the substation at Stoyestown is within the legal financial ability of the borough to accomplish.

We find that the fair value of respondent's lines within the Borough of Hooversville is \$5,338.02, a figure which we obtained by adopting the one found by the engineering conference and adding thereto \$312.02 for expenditures for new material and fixtures made since the inventory of the engineering conference. The items for replacements in Hooversville, amounting to \$127.23, are not allowed as we are of the opinion that they have no place in the property account and no allowance is made for franchise rights under the facts disclosed. See *Borough of Hanover v. Hanover Sewer Company*, 215 Pa. 95.

We likewise find that the fair value of the lines of the protestant, extending from the Borough of Hooversville to the Shaffer schoolhouse, is \$1,063.00, and that the fair value of the lines from Shaffer schoolhouse to Stoyestown is \$2,240.00. We make no allowance for the item of \$64.70 made for replacements

for reasons stated in connection with the disallowance of the item of \$127.23.

On August 7, 1916, the borough council of Hooversville adopted a resolution in the following form:

"Be it resolved by this borough council now in session that we the Borough of Hooversville acquire the property of the United Light, Heat and Power Company now owned by said company in said borough, and the supply line leading from the connection of surface wires to J. C. Shaffer at the Shaffer schoolhouse, and that a committee of three members of council be appointed to meet with the officials of said United Light, Heat and Power Company and agree with them on a reasonable compensation for their holdings as above, and if said committee and their officials fail to agree, we make then an offer of hundred dollars, and if said offer is rejected, that we acquire the said property by condemnation proceedings according to the provisions of the acts of assembly in such case made and enacted. On motion of J. P. Lohr, council accepted said resolution."

This resolution was followed by negotiations between applicant and protestant extending over a considerable period. The parties were unable to agree upon a price or upon the property which should be acquired, and the application now before us followed. It appears that the matter of increasing the municipal bonded indebtedness has not been submitted to the borough electors.

There is some doubt whether a municipality can be compelled to acquire or a utility to sell a separable portion of the latter's plant lying outside the confines of an applicant municipality. It is clear, however, that they might with the approval of this Commission voluntarily do so. The application now before us covers such extra-territorial lines of the protestant as far as Shaffer schoolhouse.

We doubt the propriety of the municipal acquisition of protestant's lines between the schoolhouse and the Stoyestown substation even under agreement. These lines exist in Quemahoning Township by virtue of the charter rights which protestant acquired under the charter of one of its constituent companies. Along this line are the six customers of protestant. To divest itself of all physical property in the township might deprive these

patrons of any service. The borough would have no right nor be under obligation to continue it. That this service to the six customers is not in and of itself remunerative is not to the point.

Charter rights carry with them corresponding duties and responsibilities. When the companies elect to acquire the one comes the burden and duty of fulfilling the other. Were the borough compelled to acquire this portion of respondent's lines it could not utilize them for light and service, and, on the other hand, it would permit the protestant to dispose of all its physical property in Quemahoning Township for which township it has secured charter rights and in which it is under public obligation to supply its service.

Very much of the argument of applicant and protestant was devoted to a consideration of the latter's appellate rights and its rights to a trial by jury. The form of procedure which must later be followed presents purely a legal question, determinable in and by the courts, and with which this Commission may not properly concern itself. We do not, therefore, determine whether the condemnatoin proceedings provided by the Borough Code of 1915, which was not a reënactment of the existing laws, but a continuance of them: Act of May 14, 1915, P. L. 314, Chapter I, Article I, Section 3, must be followed by the applicant, or whether a jury trial may be secured to the protestant under the provisions of our own act which as Justice MOSCHZISKER said in *New Brighton v. New Brighton Water Company*, 247 Pa. 232 (241), "furnishes a complete and what should prove a satisfactory system in cases of this character."

It is sufficient for us to determine, as we do, that the applicant borough may acquire the lines of respondent in Hooversville and from the borough line to Shaffer schoolhouse in Quemahoning Township. That the value of the property to be so acquired is \$6,401.02 which amount we award as compensation to be paid to the United Light, Heat and Power Company by the Borough of Hooversville. We further find that such acquisition by the borough is necessary and proper for the service, accommodation and convenience and safety of the public.

A certificate of public convenience evidencing our approval should issue.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition of the Borough of Hooversville for the issuance of a certificate of public convenience evidencing the Commission's approval of the acquisition, maintenance and operation of a transmission system of transformers, poles, wires, etc., over which electric current may be brought into the Borough of Hooversville for lighting the streets and supplying electric current to the public; and upon protest against said approval by the United Light, Heat and Power Company; and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, August 19, 1918, the Commission finds and determines that the approval prayed for is necessary and proper for the service, accommodation, convenience, and safety of the public, and that a certificate of public convenience evidencing the Commission's approval be issued.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF THE UNITED STATES RAILROAD ADMINISTRATION.*Abolition of agency stations.*

The application of the United States Railroad Administration, acting for and in control of the New York Central Railroad Company and the Buffalo and Susquehanna Railroad Corporation, for permission to abolish agency stations and substitute therefor nonagency stations at certain places in Tioga and Potter Counties, was approved for the duration of the war.

APPLICATION DOCKET NO. 1454, 1917.

Report of the Commission.

John H. Fisher, for the New York Central Railroad Co.

AINEY, Chairman :

The New York Central Railroad Company and the Buffalo and Susquehanna Railroad Corporation severally own and operate railroads in Tioga and Potter Counties, along the lines of which, in Tioga County, at Cowanesque, a joint agency station is now maintained by these two companies.

The New York Central Railroad Company, on its Cowanesque Valley branch, maintains agency stations at Osceola and at Potter Brook, Tioga County, and at Mills, in Potter County.

By reason of the small amount of business at these several stations, and because of the unusual conditions incident to the world conflict, and for the purpose of conservation of man power, and otherwise to assist in promoting the program of national preparedness and efficiency, the petitioners desire to change these from agency to nonagency stations.

Protests were filed upon the part of citizens interested and a hearing was had, at which testimony was offered by the petitioners, showing operating difficulties in the maintenance of these stations as agencies. An adjournment was granted to afford protestants an opportunity to present evidence if they so desire. We are now advised that it is not their intention to offer any evidence in support of these objections. No doubt this decision on their part was influenced because of a favorable understanding with the railroad administration secured by their counsel at the hearing referred to. By the establishment of nonagency stations it is not purposed to interfere with the regular train service heretofore obtaining. Stops at these stations will be made with the same regularity and under the same conditions as if agency stations were maintained. During the winter the station buildings will be heated and placed in charge of caretakers and the waiting rooms opened a reasonable time prior to the arrival of each passenger train. Incoming freight will be housed in the freight rooms. The chief inconvenience will arise from the fact that

passenger tickets will be no longer sold at these stations and that incoming freight must be prepaid and no notice of its arrival will be given to consignees.

Under normal conditions the Commission would hesitate and perhaps refuse to permit such a change in agency service, but measured in terms of the inconvenience which the entire American public are called upon to bear because of war, we feel constrained in the national interest and at the request of the United States Railroad Administration to grant this petition at least for the period of the war. An order will be made accordingly.

By the Commission,

WM. D. B. AINEY, *Chairman*.

THE BOROUGH OF WARREN *v.* WARREN STREET RAILWAY COMPANY.

Rates—Street railway companies—Increase of—In excess of those fixed by municipal ordinance—Alleged to be unjust and unreasonable.

The respondent filed certain supplemental tariffs, effective September 1, 1918, making increases in its rates for passenger service. The complaint alleged that the new rates were unjust, unreasonable and in direct violation of those fixed by municipal ordinance. The respondent admitted that the rates were in excess of those fixed by the ordinance, but denied all other allegations.

The capital stock of the respondent is \$375,000; bonded indebtedness, \$400,000; estimated value of its tangible property, \$815,000. The net revenue for the first six months of 1918 was \$3,288; while interest accruing during same period amounting to \$16,500.

The Commission concluded, without making a valuation, that the income was manifestly inadequate. The complaint was dismissed without prejudice, with leave to renew the same after one year.

COMPLAINT DOCKET No. 2336.

J. H. Alexander and W. S. Clark, for the respondents.

McCLURE, Commissioner, December 23, 1918:

The Borough of Warren, by ordinance adopted the 7th day of September, 1896, granted the Warren Street Railway Company the right to lay tracks and run cars upon various streets in the

municipality. The ordinance provides that the fare of each passenger shall not exceed five cents for riding from any point to destination within the limits of the borough, with transfer privileges without extra charge. Special fare tickets at the rate of three cents are authorized to be issued, subject to transfer, for travel during an hour and a half in the morning and an hour and a half in the evening, said hours to be designated by the borough council; the railway company to furnish such special tickets for sale in quantities not less than five.

Respondent company filed with this Commission and posted in its office in the Borough of Warren under date of July 27, 1918, to become effective September 1, 1918, supplement No. 1 to Local Passenger Tariff No. P-2: (1) Increasing the three-cent tickets which sold in strips of five, to five cents per ticket; (2) Providing for the sale of books containing thirty-five tickets for \$2.00, good on city cars only and for the individual purchaser; (3) Increasing the single fare on all city cars from five to six cents to any points within the borough.

Complaint was filed by the Borough of Warren August 30, 1918, in which it is stated that the rates of the supplemental tariff are in direct violation to the terms of the borough ordinance under which the respondent company is operating and that they are unjust and unreasonable. The railway company in its answer admits that the new rates are not in conformity with the terms of the ordinance but avers that the increase, owing to the enhanced cost of labor, materials and equipment, is reasonable and necessary and vital to the continuance of its business and the protection of its bond and stockholders; that expenses during eight months preceding August 31, 1918, despite a careful and economic management and operation of its road, exceeded its gross revenues, and it is impossible to keep up its roadway and equipment, or provide a sinking fund for the retirement of its bonds, and that the rate complained against will produce gross earnings sufficient only to meet the usual and ordinary maintenance and operating expenses at the present cost of materials and standard of wages, and yield a fair return upon the amount of capital invested.

Hearing was had after due notice to the parties and testimony taken on the part of the respondent. No one appeared for the complainant.

In *Borough of Wilkinsburg v. Pittsburgh Railways Company*, 4 Dep. Rep. 1699, we have held that where the consent of the local authorities, which authorizes the construction of street passenger railway, contains a provision fixing the fare to be charged, this Commission, if necessary, can change that fare so it will be just and reasonable.

The evidence discloses that the railway company owns about eight miles of electrically operated passenger railway in the Borough of Warren, a town of 15,000 inhabitants. Its lines also extend to Sheffield thirteen miles from Warren, passing through the villages of Stoneham, Clarendon, Tiona and Saybrook. The tangible property of the company, used and useful, including tracks, pole lines, bridges, power-house, car barn, office building, cars and electrical equipment, oil and gas rights, according to the testimony of its manager approximated \$800,000 in value. Its capital stock is \$375,000; its bonded indebtedness, \$400,000, \$200,000 bearing interest at the rate of five per cent. and \$200,000 at six per cent. The money represented by the stock and bonds was invested in the property of the company. No sinking fund has been provided for the redemption of its bonds. Six per cent. dividends have been paid on the stock up to and including the year 1917. No dividends have been paid this year.

Like many other public utility companies, the cost of its labor and materials, due to abnormal conditions, has increased much more rapidly than its gross earnings. From the year 1912 to the year ending December 31, 1917, operating expenses had increased 69 per cent. and the gross revenue but 37 per cent. Railway operating revenue for nine months ending September 30, 1918, was \$116,106.40. Railway operating expenses for the same period including taxes amounted to \$112,817.93. Net revenue from operations, \$3,288.47. The company had this small net return from operations to meet the interest of \$16,500, matured and accrued upon its funded debt, for the upkeep of its property and depreciation charges. It is thus apparent that increased revenue is urgently needed by the company and necessary to its maintenance as an efficient public carrier.

On the 18th of July of this year, the schedule of rates on the interurban line was changed and the fare raised from five to seven cents per zone, making the present rate 2.5 cents per mile. For the month of September, 1918, when both the interurban and the city rates were effective, the gross revenue was \$13,702.77; for the same period during the year 1917, \$11,413.05, a gain for the month under the new tariff of \$2,279.72. In the month of October, 1918, there was a falling off in the gross revenue from October, 1917, of \$1,181.86, largely due to the influenza epidemic. If then the results for the month of September, 1918, be taken as a criterion of what may be expected to be derived from the present tariff, and the evidence shows September to have been an exceptionally favorable month, the company will have an increase in gross annual income of \$27,596.64. This will give the company \$30,885.11 per annum to meet the interest on its funded debt, \$22,500, its obligation to the Borough of Warren for street paving and for renewals and depreciation. The increase will permit no dividends on the capital stock, nor sinking fund for the retirement of its bonds.

As this case has developed we do not deem it necessary now to find the fair value of all respondent's property for the establishment of a rate base. The testimony is to the effect that the tangible property is worth \$815,000. Assuming all the property tangible and intangible to have a value not less than the company's funded debt of \$400,000—which under the evidence is entirely justifiable, it is evident that the rates fixed in the supplemental tariff complained against, so long as the conditions under which the company is now operating obtain, cannot be held to be unjust or unreasonable. The respondent must have the additional revenue to prevent it from drifting into insolvency. On the other hand the public should not be permanently burdened by a rate which is only justifiable in abnormal times. We are accordingly of the opinion that the complaint should be dismissed without prejudice, the complainant to be allowed to renew the same in one year from this date, the respondent then as now assuming the burden of proof. And it will be so ordered.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer

on file and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon which said report is hereby approved and made a part hereof:

Now, to wit, December 23, 1918, It is ordered: That the complaint in this case be and the same is hereby dismissed without prejudice; the complainant to be allowed to renew the same in one year from the date hereof, the respondent company then, as now, assuming the burden of proof in justification of the rates complained against.

By the Commission,
WM. D. B. AINEY, *Chairman.*

PUBLIC SERVICE COMMISSION.

**LIGHT COMMITTEE OF COUNCIL OF LEWISTOWN BOROUGH v. PENN
CENTRAL LIGHT & POWER COMPANY.**

*Rates—Electric companies—Gas companies—Apportionment of
property and operating expenses—Minimum monthly rate—
Legality of ready-to-serve charge.*

A public utility company serving an extended territory may apportion its property and operating expenses to any particular locality.

A minimum charge of \$1.00 per month for electric service which will, in connection with other rates, produce a revenue of 7.1% for return and depreciation is not unreasonable.

The Public Service Company Law does not prohibit the use of a ready-to-serve charge in tariff schedules, and such a charge is not illegal.

The ready-to-serve charge in the gas schedule under attack is not unreasonable, but should be graded in recognition of the variation in demand as evidenced by the size of the meter.

COMPLAINT DOCKET No. 1441.

Report and Order of the Commission.

Wm. W. Chisholm and Henry W. Petriken, for complainants.

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James S. Woods and J. L. Simpson, for Raystown Water Company.

L. J. Durbin and John E. Fox, for the Borough of Lewistown.

S. B. Hare, for the Boroughs of Hollidaysburg and Juniata.

James Collins Jones, for respondent.

BY THE COMMISSION:

On April 2, 1917, the Penn Central Light & Power Company, respondent, published new schedules showing a proposed change and increase in the rates respectively for gas and electricity which it furnishes to the residents of the Borough of Lewistown, Mifflin County.

A complaint was filed on May 1, 1917, on behalf of the council and the citizens and residents of the said borough, alleging that the proposed changes and increase in the rates for gas and electricity were unjust, unreasonable, and excessive.

The schedule in effect prior to May 2, 1917, provided an initial meter charge for all gas consumed for general use of \$1.25 net per thousand, with a minimum monthly payment requirement of 50 cents. The new schedule provides a ready-to-serve charge of 75 cents per month for all consumers, together with a net rate of 85 cents per thousand cubic feet for all gas consumed up to fifty thousand cubic feet per month. The net rate for larger consumption decreases in blocks, the lowest rate being 60 cents net for consumption in excess of four hundred thousand cubic feet per month.

The rates for residential and commercial metered lighting in effect prior to May 2, 1917, were 9.6 cents per net K. W. Hr. for the first thirty hours' use of the connected load, and 4.8 cents net per K. W. Hr. for the remaining consumption, with a minimum monthly charge of 50 cents. The new rates for the same service are 10.45 cents and 5.7 cents net with a minimum monthly charge of \$1.00.

It developed that the complainant's protest was directed particularly against certain features of the new rates, the need of additional revenue not being contested. The issues to be determined were therefore narrowed down to the following:

(1) The reasonableness of a minimum monthly charge of \$1.00, in connection with a rate of 11 cents per K. W. Hr. for the first thirty hours' use of the connected load, and 6 cents per K. W. Hr. for the remaining portion of the consumption, subject to a discount of 5% for prompt payment; these rates applying to residential and commercial metered lighting.

(2) The reasonableness and legality of a uniform ready-to-serve charge of 75 cents per meter per month, in conjunction with a net rate of 85 cents per thousand cubic feet for all gas consumed up to fifty thousand cubic feet per month.

The burden of proof rested upon the respondent, and in support of its rates the respondent submitted an appraisal of its properties, together with statements of operating revenues and expenses and analyses based thereon in support of the ready-to-serve charge and the minimum. The complainants did not offer any testimony and did not contest the testimony offered by the respondent.

THE ELECTRIC CASE.

The respondent's electric system serves an extended territory along the main line of the Pennsylvania Railroad from Lewistown, Mifflin County, to Hastings and other points in Cambria County. A main office is maintained in Altoona, and district offices are maintained in a number of the communities served. The problem presented is to pass upon the reasonableness of certain rates as measured by the cost of the service in a community in which the company has about 1,200 customers as compared with some 15,000 throughout its entire territory.

The respondent presented an apportionment of its property and of its operating expenses chargeable to the service in Lewistown. The appraisal and the apportionment of property are based upon methods that are set forth sufficiently to enable their general acceptance. The apportionment of operating expenses is not so fully set forth, and it is necessary to rely upon the general result as a measure of reasonableness of the methods and amounts used in determining that result. It is estimated that the application of the new rates and the increased operating costs to the 1917 business would have resulted in a net revenue of \$17,700 available for

depreciation and for fair return on a property which the company estimates has a present value of some \$229,000, or about 7.7%. Assuming an allowance of 3% for annual depreciation, it follows that it would require a very large reduction in the value of the plant to make the return to the owners unreasonably high, provided the operating expenses are accepted as being reasonable.

The operating costs for the year ending April 30, 1917, as presented and analyzed by the respondent, are as follows:

LEWISTOWN ELECTRIC EXPENSE.

Year Ending April 30, 1917.

	<i>Amount</i>	<i>Cost per Unit</i>
Production	\$6,492 52	\$.0091 per K. W. Hr.
Transmission ...	568 80	.0008 " " "
Distribution	,2376 99	1.973 per customer
Utilization	1,377 32	1.143 " "
New business ...	1,944 87	1.614 " "
Commercial	3,293 93	2.734 " "
General	6,202 34	5.148 " "
Total,	\$22,256 77	\$12.612 " "

Average number of customers 1,205

Connected load 1,148 K. W.

Demand Not given

Output 714,000 K. W. Hrs.

MINIMUM CHARGE ANALYSIS.

	<i>Cost per Month</i>
Operating expenses	\$1 05
Fixed charges on service connection (\$16.80 @ 11%)	15
Fixed charges on distribution system (\$15.93 @ 11%)	15
Fixed charges on manufacturing plant (\$88.81 @ 11%)	81
Total cost per customer per month exclusive of any energy delivered	\$2 16

The operating costs presented are the result of respondent's apportionment of the total cost of operating its system. While the amounts suggested for utilization, new business, and general

expense chargeable to Lewistown are open to question, the Commission is of the opinion that they may be accepted for the purpose of this case as being not unreasonable enough to alter the general findings.

The complainants do not question the need of additional revenue, or the general distribution thereof, except with respect to the effect upon the customers of increasing the minimum charge from 50 cents to \$1.00 per month. The complainants offered no testimony to show to what extent the rate payers would be affected, and neither party offered testimony to show the consumption of current or the demand of customers who are affected by the application of the increased minimum.

The above analysis purports to show an expense incurred by the company before the delivery of any electricity whatever of \$2.16 per month. The Commission is not convinced that all of the costs of distribution and of general expense should be divided equally among the customers, or that the distribution system and the manufacturing plant should be similarly considered. The variation in the demands made upon the system by the various classes of customers should be given recognition in such an analysis. Computations based upon the operating costs suggested by the respondent and upon assumptions as to demand, etc., favorable to the small customers result in a cost of \$1.36 per month incurred by the respondent before any energy whatever is delivered. This result is based upon operating figures some of which are open to question as to reasonableness, but even material reductions in the doubtful items will hardly bring the result much below \$1.00.

An examination of a number of the electric schedules on file with the Commission establishes a frequent use of a \$1.00 minimum charge for similar service in communities throughout Pennsylvania.

In conclusion, while the costs and deductions therefrom, as presented by the respondent, are not entirely convincing, it is our opinion that, under all the facts and circumstances of the case, they show that a minimum charge of \$1.00 a month, in connection with an initial rate of 9.6 cents net per K. W. Hr. is not unreasonable.

THE GAS CASE.

The respondent presented an estimate of present value of its gas plant based on normal prices under the reproduction theory of \$231,865, of which some \$200,000 represents physical property. It is estimated that the application of the new rates and the increased operating costs to the 1917 business would have resulted in a net revenue of \$4,000 available for depreciation and for fair return on the property. The Commission considers the estimates submitted generally reasonable, and hence it would follow that the gross revenue asked for by the respondent is certainly not unreasonable.

In support of its new rate, the respondent offers an analysis resulting in a ready-to-serve charge of \$1.81 per month for a five light meter and a cost for gas of 51 cents per thousand cubic feet. The Commission is not in accord with the theory underlying this analysis, and believes that only certain portions of the fixed charges and of the operating expenses belong in a ready-to-serve charge. The remaining portions should be carried in the rate per thousand cubic feet. An analysis under this latter concept results in a ready-to-serve charge of \$1.26 per month with an average net rate for gas of 76 cents per thousand cubic feet.

Some authorities consider that in the determination of a ready-to-serve charge for gas schedules, it should be based upon the consumer costs plus the fixed charges on the portion of the company's property between the street main and the premises served. An analysis under this concept results in a ready-to-serve charge of 48 cents per month and an average net meter rate of \$1.36 per thousand cubic feet.

The respondent, believing it unwise to follow strictly the result of its cost analysis, has fixed the ready-to-serve charge of 75 cents per meter, and the net meter rate for the first block of consumption at 85 cents per thousand cubic feet. The ready-to-serve charge is the same for all customers, regardless of the size of the meter. No testimony was offered in support of this feature of the new schedule, and in our opinion it is not reasonable and should be changed. The ready-to-serve charge should vary in recognition of the variation in demand as evidenced by the size of the meter, and a graded schedule should be prepared that will re-

turn practically the same revenue that would be received from a uniform ready-to-serve charge of 75 cents per month. Subject to this correction, the proposed charges can be accepted as reasonable in amount.

There remain for consideration the legality of this form of charge and the reasonableness and desirability of its use.

The reasonableness of minimum charge requirements in utility schedules has been firmly established, and is specifically approved in the Public Service Company Law. The use of a separate charge to cover stand ready costs is very general in electric power schedules and at the present time the trend is undoubtedly toward a wider use of this form of charge in gas, water and other utilities delivering a product. The Public Service Company Law does not prohibit its use either directly or indirectly.

There is no distinction in principle between a system of minimum payments and a system of ready-to-serve charges. Both are predicated upon the same analysis of the total cost of the service. Both recognize the element of "Stand ready to serve." In a schedule with minimum payment requirements, the ready-to-serve costs are concealed in the rate per unit and in the minimum. In a schedule with a pure ready-to-serve charge these costs stand revealed.

The compliants admit that the same elements underly the determination of a minimum charge or a ready-to-serve charge, but they prefer the minimum and contend that there is no authority in the law supporting a ready-to-serve charge. The respondent contends that the ready-to-serve charge is the full realization or utilization of a principle, whereas the minimum charge is only an approximation thereto. Respondents' argument that Paragraph (a), Section 1, Article III, of the Public Service Company Law, making it lawful for the public service company to collect "just and reasonable rates for each and every service rendered" sanctions or makes lawful the ready-to-serve charges, seems to be putting a forced and strained construction upon the language of the act, which would seem to be unnecessary under the circumstances. The act specifically approves the use of a minimum charge and does not prohibit the use of a ready-to-serve charge. No matter what the form of the schedule, the rates must be fair, reasonable and just, and it is left to the dis-

cretion of the Commission to determine whether they can or cannot meet such requirements in any specific case. The Commission concludes that there is nothing illegal in the use of a ready-to-serve charge under the circumstances existing in this case.

The Commission has not adopted any fixed policy in the matter of a ready-to-serve charge, even though it has in several instances, under certain conditions and circumstances, approved its use. A ready-to-serve schedule can be made to follow more closely the cost of the service and hence results in a more equitable division.

The complainants have failed to offer the Commission any measure of the effect of this particular requirement upon the total payments to be made by the various groups of customers, except to call attention to the fact that about forty per cent. of the customers are relatively small users and that the burden of the increase will fall most heavily upon them. This is undoubtedly true, but would be just as true if a minimum charge were to be established. Such a minimum charge would have to contain not only the stand-ready cost but also the cost of any gas furnished thereunder. The circumstances disclosed in the record do not indicate that the use of a ready-to-serve charge is unjust or unreasonable.

SUMMARY AND CONCLUSION.

The Commission concludes that a minimum monthly charge of \$1.00 for residential and commercial electric lighting, in connection with the rates per kilowatt hour specified above, is not unreasonable and that this item of the complaint should be dismissed.

The Commission further concludes that there is nothing illegal in the use of a ready-to-serve charge in a gas schedule, and that the evidence does not warrant a finding that the use of such a form of charge in this case is unjust or unreasonable; and that there is nothing unjust or unreasonable in the division of the gross revenues as effected by the schedule under attack, except that the ready-to-serve charge should be graded in recognition of the variation in demand as evidenced by the size of the meter.

The respondent will be directed to file within fifteen days a supplement to its tariffs, to become effective upon approval by the Commission, which shall provide a graded system of ready-to-serve charges that will return practically the same revenue as

would be received from a uniform ready-to-serve charge of 75 cents per month. Upon this being done, the case will be marked closed. An order will issue accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon which said report is hereby approved and made part hereof:

Now, to wit, November 20, 1918, It is ordered: That in so far as it relates to residential and commercial electric lighting this complaint be and the same is hereby dismissed.

It is further ordered: That the respondent, the Penn Central Light & Power Company, within fifteen days from the date of service of this order, shall file a supplement to its gas schedule providing a graded system of ready-to-serve charges as directed in said report to become effective upon approval by the Commission and upon this being done the complaint will be marked closed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

LIGHT COMMITTEE OF COUNCIL OF LEWISTOWN BOROUGH v. PENN
CENTRAL LIGHT & POWER COMPANY.

*Rates—Gas companies—Proposed supplement to tariff submitted
pursuant to order of the Commission.*

(See preceding case.)

COMPLAINT DOCKET No. 1441.

Report and Order of the Commission.

BY THE COMMISSION:

In this proceeding, under date of November 20, 1918, the Commission made an order dismissing the complaint in so far as it related to the residential and commercial electric lighting rates covered by the schedule of the respondent company of April 2, 1917, and directing the company to file a supplement to its gas schedule, providing a graded system of ready-to-serve charges, as directed in said report, to become effective upon approval by the Commission.

Under date of December 20, 1918, the respondent submitted a proposed Supplement No. 5 to Gas P. S. C. Pa. No. 2, containing the following schedule of ready-to-serve charges:

<i>Size of Meter Installed</i>	<i>Ready-to-Serve Charge Dollars per Month</i>
3-Light	\$0.70
5- " .....	.75
10- " .....	.85
20- " .....	.90
45- "	1.25
60- "	1.50
60A "	2.10

We have carefully examined the ready-to-serve charges contained in this proposed supplement and are of opinion that they are just and reasonable and so adjusted as to comply with the former determination of this Commission.

Under the circumstances of this case, we therefore approve the ready-to-serve charges contained in this proposed supplement and direct that the respondent make them effective upon one day's notice to the public and this Commission by a supplement to its existing tariffs, which shall contain only the said ready-to-serve charges.

ORDER.

And now, to wit, January 20, 1919, after investigation by the Public Service Commission of the Commonwealth of Pennsylvania, the Penn Central Light & Power Company is *ordered and directed* to file, post and publish the supplement mentioned in said report to become effective within fifteen days of this date.

By the Commission,

WM. D. B. AINEY, *Chairman*.

EDINBORO STATE NORMAL SCHOOL *v.* THE PGH. & LAKE ERIE RAILROAD CO., ERIE RAILROAD CO., BESSEMER & LAKE ERIE RAILROAD CO., AND NORTHWESTERN PENNA. RAILWAY CO.

Rates—Failure of respondents to establish those ordered by the Commission—Increase of ordered by the Director General of Railroads.

On April 10, 1918, the Commission ordered the respondents to make effective a joint rate of \$1.55 per ton on coal from the mines in the Pittsburgh District to Edinboro, Pa. This order the respondents failed to carry out, and continued to collect \$2.30 per ton. The Director General of Railroads, about a month later, ordered an increase of 30 cents per ton. The Commission ordered the respondents to establish a joint rate of \$1.55 per ton, plus the 30 cent increase, effective within two weeks.

(See also 6 P. C. R. 261.)

COMPLAINT DOCKET NO. 1349.

Report and Order of the Commission.

Henry Baur, for complainant.

J. M. Sternhagen, for the Pittsburgh & Lake Erie R. R. Co.

M. B. Pierce, for the Erie R. R. Co.

J. V. Styers, for the Bessemer & Lake Erie R. R. Co.

Charles M. Hatch, for the Northwestern Penna. Ry. Co.

RYAN, Commissioner :

On April 16, 1918, the Commission ordered the respondents, the Pittsburgh & Lake Erie Railroad Company, the Erie Railroad Company, the Bessemer & Lake Erie Railroad Company, and the Northwestern Pennsylvania Railway Company, to make effective a joint rate of \$1.55 per net ton for transportation of bituminous coal, in carload lots, from mines in the Pittsburgh District to Edinboro, and, to apportion the total of said rate between the respective carrier, and if they were unable to agree, then a division would be determined by the Commission as provided by law.

The respondents having failed to obey this order within a reasonable time, the matter was brought to their attention by correspondence. The Pittsburgh & Lake Erie Railroad Company and the Bessemer & Lake Erie Railroad Company are the originating carriers, and should have issued the necessary tariffs. These respondents give as their reason for not filing the rate fixed by the Commission the refusal of the Northwestern Railway company to issue a concurrence, and direct our attention to the 30 cents per ton increase applicable to the rate in question by General Order No. 28 of the Director General of Railroads, effective June 25, 1918. The Erie Railroad Company, the intermediate carrier, advised the Commission that it was and is ready to proceed with the publication of the rate and the arrangement of the division thereof. The Northwestern Pennsylvania Railway Company gives as its reason for refusing to issue a concurrence, that an agreement has not yet been reached upon a satisfactory division—meanwhile they are jointly collecting \$2.30 per net ton.

Pursuant to a resolution of the Commission of June 3, 1918, the secretary advised the Bessemer & Lake Erie Railroad Company that the Commission's order was to be made effective at once, and that the rate of \$1.55 per net ton should be the base rate to which might be added the increase ordered by the Director General of Railroads in General Order No. 28. Notwithstanding this, the respondents have not established the joint rate ordered by the Commission, which rate would become \$1.85 per ton, with the 30-cent increase ordered by the Director General added to the \$1.55 rate fixed by this Commission.

In view of the fact that our order was issued on April 16, 1918, over a month prior to the issuance of General Order No. 28, it is our opinion that the rate of \$1.55 per net ton is the base rate to which may be added the increase subsequently ordered by the Director General of Railroads.

The issuance of a concurrence by the Northwestern Pennsylvania Railway Company can in no way prejudice that company. The law specifically provides, and our order of April 16, 1918, directed attention thereto, that if a division cannot be agreed upon one will be established by the Commission. "Where the public service companies entitled to share in any joint rate or charge shall be unable to agree upon the division thereof * * * the Commis-

sion may * * * fix the proportion to which every such public service company shall be entitled." Article V. Sec. 10.

Under all circumstances, we are of opinion, find, and so direct:

I.

That the Northwestern Pennsylvania Railway Company issue within one week and file within ten days the necessary concurrence to enable the publication of the rate.

II.

The Pittsburgh & Lake Erie Railroad Company and the Bessemer & Lake Erie Railroad Company publish within two weeks the tariffs making effective upon one's day's notice the rate fixed in the original order of this Commission, which rate may be increased in accordance with the terms of General Order No. 28.

III.

That the respondents jointly and severally make effective the foregoing findings within two weeks.

IV.

That jurisdiction of this complaint be retained by the Commission for the purpose of determining the amount of damages, if any, which the complainant has sustained by reason of the collection of charges for the transportation of bituminous coal in car-load lots under the rates found by the Commission to be unreasonable, as a basis for an order of reparation.

SUPPLEMENTAL ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon informal complaint that the respondents have failed to comply with the terms of the order of the Commission to them directed on April 16, 1918, and due investigation of the matters and things involved having been had and the Commission on the date hereof having made and filed a report

containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, December 2, 1918, It is ordered: That the respondent, the Northwestern Pennsylvania Railway Company, issue within one week, and file within ten days from the date of the service of this order, the necessary concurrences to enable the publication of the rate prescribed in the original order of the Commission; and

It is further ordered: That the respondents, the Pittsburgh & Lake Erie Railroad Company, the Erie Railroad Company, and the Bessemer & Lake Erie Railroad Company, publish within two weeks the tariffs making effective upon one day's notice the rate fixed in the original order of this Commission, which rate may be increased in accordance with the terms of General Order No. 28 of the Director General of Railroads; and

It is further ordered: That the respondents jointly and severally make effective the foregoing findings within two weeks; and

It is further ordered: That jurisdiction of this complaint be retained by the Commission for the purpose of determining the amount of damages, if any, which the complainant has sustained by reason of the collection of charges for the transportation of bituminous coal in carload lots under the rates found by the Commission to be unreasonable, as a basis for an order of reparation.

By the Commission,

WM. D. B. AINEY, *Chairman.*

EDINBORO STATE NORMAL SCHOOL *v.* PITTSBURGH & LAKE ERIE
RAILROAD CO., ET AL., ERIE RAILROAD CO., BESSEMER & LAKE
ERIE RAILROAD CO., NORTHWESTERN PENNA. RAILROAD CO.

Rates—Fixing of—Jurisdiction of the Commission.

The joint rate ordered by the Commission to be put in force by the respondents not having been complied with, it was ordered that notice of the previous orders of the Commission be given to the Director General of Railroads, and that the railroads be required to show cause why the same should not be regarded as the base rate. (See preceding case.)

COMPLAINT DOCKET No. 1349.

Report and Order of the Commission.

Henry Baur, for complainant.

J. M. Sternhagen, for Pittsburgh & Lake Erie R. R. Co.

M. B. Pierce, for the Erie R. R. Co.

J. V. Styers, for the Bessemer & Lake Erie R. R. Co.

Charles M. Hatch, for the Northwestern Penna. R. R. Co.

RYAN, Commissioner:

On April 16, 1918, this Commission sustained the complaint filed against the respondents, and ordered them to file a tariff or schedule setting forth a joint rate of \$1.40 per ton for the carriage of bituminous coal from the Pittsburgh District to Edinboro, Pennsylvania.

On December 2, 1918, a supplemental order was entered permitting the addition to the rate, hitherto determined to be just and reasonable, of the general increases upon all commodities carried by the transportation companies, which general increases had been directed to be made by the Director General of Railroads. At the same time we held the \$1.40 per ton rate to be the base rate, it having been so adjudged by us prior to the taking over of the railroads by the Government of the United States.

The filing of a joint rate is requisite because the hauling of the coal is a movement participated in by the railroads and the railway, and of which there should be equitable division and its filing is in accordance with Article II, Section 1 (e), of the Public Service Company Law.

In obedience to our order, the Northwestern Pennsylvania Railway Company has forwarded to the other respondents its "concurrency," but notwithstanding this action the railroads refuse to comply with our orders and deny our right to compel them to file such tariff or schedule.

The railroads are being operated under the direction of the Director General of Railroads, and as our record does not affirmatively show knowledge by him of our order of December 2, 1918,

we now direct that notice of the action of this Commission and of its several orders be given to him and that the railroads be required to show cause, if any they have, why the rate of \$1.40 per ton for the hauling of bituminous coal from the Pittsburgh District to Edinboro, Pennsylvania, fixed by this Commission prior to the date of the taking over of the control and management of said railroads by the Government of the United States should not be regarded as the base rate; and to show cause, if any they have, why a tariff or schedule setting forth such joint rate in accordance with our order and supplemental order should not be filed, ——— returnable February 3, 1919.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and it appearing that the respondent railroads are being operated under Federal control by the Director General of Railroads of the United States; and it further appearing that our record does not affirmatively show knowledge by the Director General of our order of Dec. 2, 1918;

Now, to wit, January 14, 1919, it is ordered: That notice of the action of this Commission, and of its several orders in this case, be given to the Director General of Railroads, and that the railroads be required to show cause, if any they have, why the rate of \$1.40 per ton for hauling of bituminous coal from the Pittsburgh District to Edinboro, Pennsylvania, fixed by this Commission prior to the date of the taking over of the control and management of said railroads by the Government of the United States should not be regarded as the base rate; and to show cause, if any they have, why a tariff or schedule setting forth such joint rate in accordance with our order and supplemental order should not be filed, ——— returnable Feb. 3, 1919.

By the Commission,

WM. D. B. AINEY, *Chairman.*

PITTSBURGH STEEL CO. v. THE MONONGAHELA RAILWAY CO. AND
THE PITTSBURGH & LAKE ERIE RAILROAD CO.

PITTSBURGH STEEL CO. v. THE PITTSBURGH & LAKE ERIE RAIL-
ROAD CO.

*Rates—Fixing of—Jurisdiction of the Commission—Intrastate
railroads—Orders of Director General of Railroads.*

The complaints alleged that excessive rates were being charged by the respondents for the transportation of coal and coke to the plant of the complainant. The respondents denied that the rates were excessive, and moved to dismiss the complaints for want of jurisdiction in the Commission to hear and determine the same. It was contended for the respondents that the rates complained of were ordered by the Director General of Railroads under authority of the several acts of congress relating thereto. The respondents were admittedly intrastate railroads.

The Commission concluded that neither the Act of Congress of Aug. 29, 1916, which authorized the President, in time of war, to take possession of the railroads "for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable," nor the Act of Congress of March 1, 1918, giving the President the power to increase the rates of the railroads, deprived the Commission of its power to review and fix the rates of a purely intrastate railroad, except when such railroads, as provided in the latter act, are engaged in the "transportation of troops, war materials, government supplies, or the issue of stocks and bonds." The Commission, being of the opinion that the lowering of the rates complained of would not affect the transportation of troops, etc., asserted power in itself to regulate the same, and ordered the cases set down for further hearing, notice of which will be served upon the officials operating the defendant companies for the Director General of Railroads.

COMPLAINT DOCKET NOS. 2153 AND 2154.

Report and Order of the Commission.

Willis F. McCook, for complainant.

George E. Shaw and John M. Sternhagen, for respondents.

McCLURE, Commissioner:

These cases were, by agreement of counsel, heard together. The complainant is a corporation organized under the laws of Pennsylvania and is engaged in the making of iron and steel products. Its blast furnaces and steel plant are located at Monessen, West-

moreland County, Pennsylvania. In the production of pig iron, the complainant consumes large quantities of coke, which is being shipped from Allison, Pa., and Alicia, Pa., located in the Klondike coal region, over the lines of the Monongahela Railway and the Pittsburgh & Lake Erie Railroad to the complainant's works at Monessen. In Complaint No. 2153 the defendants are charged with exacting a rate of 90c per net ton for the transportation of coke in carloads from the Klondike coke region when loaded by the shippers and consigned to the complainant at Monessen, an average distance of twenty miles on the Allison shipments, and seventeen and one-half miles on the Alicia shipments, as shown in the Pittsburgh & Lake Erie Railroad Company's Tariff P. S. C. Pa., 562, I. C. C. No. 1904. It is further charged by the amendment to Section 7 of the petition that "Since the institution of the above unjust and exorbitant rate of 90c per ton, the Hon. W. G. McAdoo, Director General of the United States Railroad Administration, has issued his General Order No. 28, which makes an advance effective June 25, 1918, page 6 of said order, or 30c per net ton above the said 90c rate, or a total rate for said haul of \$1.20 per net ton."

In petition No. 2154 complainant alleges that it consumes large quantities of coal which are shipped to its plant over the defendant's railroad from mines within a radius of seven miles from Monessen, and that the defendant charges and exacts for the transportation of coal in carloads loaded at said mines by the shippers when consigned to the complainant at Monessen, the rate of 23c per net ton; a haul of not to exceed an average of five miles, and for a large quantity of the coal less than two miles; that for many years prior to July 1, 1917, the defendant established and used a rate of 10c per net ton for a coal haul of seven miles and under, between points on a line of its railroad. By its tariff filed before this Commission P. S. C. Pa., No. 546, the railroad cancelled the said rate of 10c per ton effective on and after July 1, 1917, and established and used the rate of 23c per net ton on a haul not exceeding seven miles. It further alleges that since the establishment of the above rate of 23c the Director General of the United States Railroad Administration has issued General Order No. 28, whereby effective June 25, 1918, the above rate of 23c per net ton is increased to 40c per net ton. All of the above

rates of 90c and \$1.20 for coke, and 23c and 40c for coal are charged to be excessive, unreasonable, unjust, and unduly discriminatory. This Commission in Complaint No. 2153, is asked to make an order commanding the defendants to cease and desist from the charge of 90c or any other greater sum on coke hauled by them from the Klondike coal region to Monessen, and to require them to apply a maximum rate in the future not exceeding 50c per net ton; and in Complaint No. 2154 to issue an order to cause the defendant to cease and desist from collecting the rates of 23c and 40c per net ton and to apply as a maximum rate in the future for the transportation of coal between points within the seven-mile radius and Monessen, a rate not exceeding 18c per ton.

Defendants in their answers deny that the rates are unjust, unreasonable, or discriminatory, and allege further that on December 28, 1917, the President of the United States took possession and assumed the use and control of their railroads, and since that time he has been and is now operating the same through the Director General of Railroads; that the rates and charges now published and enacted for the transportation of coal and coke to Monessen, were published and are being assessed pursuant to and in accordance with an order of the Director General, known as General Order No. 28, effective June 25, 1918; and that said rates are published in tariffs on file with the Interstate Commerce Commission pursuant to said order.

Testimony was taken on behalf of the complainant in support of the allegations of its petition. Defendants then moved to dismiss the complaints for want of jurisdiction in the Commission over railroad rates and fares during the period of Federal control.

An important question raised by this record is whether the respondent railroads now being operated under the direction of the Director General of Railroads are subject to the orders and directions of this Commission in the regulation of rates and charges for the movement of freight on railroads wholly within the State not connected with the transportation of troops, war materials or government supplies.

Respondents are Pennsylvania corporations exercising the powers and enjoying the rights conferred upon them by the Commonwealth. The rates attacked are for intrastate transportation, and in times of peace their regulation is within the jurisdiction of

the State and this Commission, to whom its authority has been delegated. The Federal statute to regulate commerce contemplated no interference therewith. This was ruled in *Simpson v. Shepard*, 230 U. S. 352, (*The Minnesota Rate Cases*.) Mr. Justice HUGHES in delivering the opinion of the court at page 420, says:

“Congress did not undertake to say that the intrastate rates of intrastate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the states without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the states and the agencies created by the states to deal with that subject. *Missouri Pacific Ry. Co. v. Labaree Mills*, 211 U. S. 612, 620, 621.

Only where the use by the State of an instrument of interstate commerce in a discriminatory manner so as to inflict injury on any part of that commerce, may the Federal authorities control the intrastate transactions of intrastate carriers. (*Houston v. Texas Railway v. United States*, 234 U. S., page 342.)

Undoubtedly congress in a time of war in the exercise of its constitutional powers “To * * * provide for the common defense and general welfare of the United States” (Art. I, Sec. 8, Sub Div. 1), “To declare war” (Art. I, Sec. 8, Sub Div. 11), “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof” (Art. I, Sec. 8, Sub Div. 18), had the power to pass the Act of August 29, 1916, which is as follows:

“The President, in time of war, is empowered, through the Secretary of War, to take possession and assume

control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

Under the authority of this statute, the President in time of war, through the Secretary of War, could utilize the railroads for the transportation of troops, munitions and supplies, and operate them as a whole for that purpose, or for such other purposes connected with the emergency, as might be needful or desirable. But that these powers could be delegated to any other official than the Secretary of War, was questioned in *Muir v. Louisville & Nashville Railroad Company*, 247 Fed. 888. Judge Evans in his opinion at page 894, says:

"Under no established rule of interpretation can it be doubted that it was the intention of the legislative body to authorize, in-time of war, the War Department, and no other to take over the railroads for war purposes, such as transportation of troops and war material, and for such other purposes as might be desirable in the emergencies of war. Besides being an appropriate function of the War Department, it was the plain meaning of the statute which congress enacted that the War Department should have authority over it, and even assume (which is inconceivable) that the Secretary of War declined for that department to take up the war work indicated, we find nothing in the statute which authorizes it to be taken up by the Treasury Department, nor by a Director General of Railroads; congress not having intrusted the work to either. And the situation, if strict rules were to operate, might involve consideration of the question whether the rule stated by the Supreme Court in *Smith v. Black*, 115 U. S. at page 319, 6 Sup. Ct. 56, L. Ed. 398, to the effect that, 'where there is a statute requiring a thing to be done by a known and responsible public officer, it may well be held that he must do it in person,' would not apply."

If, however, it be assumed that the Director General under the proclamation of the President of December 26, 1917, was vested with the power which the President through the Secretary of War

was authorized to use, this power attempted to be exercised under the Act of August 29, 1916, must be limited strictly to such acts as are necessary in the emergency of war. This statute did not in any sense give unlimited power to the President to regulate intrastate rates whether they applied to an emergency or not. If such power exists it must be found in the provisions of the Federal Control Act of March 1, 1918, which statute treats the taking over of the railroads as an accomplished fact. Its principal purposes are to provide for the compensation of the railroad owners; to provide for the operation of the carriers; and to provide for their rehabilitation and restoration to operating efficiency while under Federal control. This control is to continue during the war and for a period of time thereafter not to exceed one year and nine months. In Section 10 of the act it is said:

“Carriers while under Federal control shall be subject to all laws and liabilities as common carriers, whether arising under State or Federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such Federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government.”

Said section further provides as follows:

“During the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the Commission pending final determination.”

“Said rates, fares, charges, classifications, regulations, and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall, upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge,

classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations or practices or changes therein, the Interstate Commerce Commission shall give due consideration to the fact that the transportation systems are being operated under a unified and coördinated national control and not in competition.

"After full hearing the Commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act; provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make. (March 21, 1918, C. 25, Sec. 10, 40 Stat.)"

It thus appears that the President may initiate rates subject to review by the Interstate Commerce Commission. The Commission in determining the reasonableness of the rates must take into consideration the finding by the President that more revenue is necessary to meet the expenses of Federal control. In addition to a proper return to the owners, the needs of the government for money to operate the roads must now be taken as a factor. But there is nothing in the act which in terms makes this provision apply to intrastate rates, and we think it can not impliedly be held to apply to them. They are referred to merely as "rates" without an adjective either interstate or intrastate. That the Interstate Commerce Commission had no authority to establish rates for purely intrastate commerce and that this commerce was subject to the jurisdiction of the several states acting through their

commissions was well known to congress. Only by express terms and in unequivocal language would such important powers be attempted to be transferred from State to Federal jurisdiction. If the purpose was to deprive the states of these powers it is inconceivable that it would be attempted by mere implication. Congress in Section 15 of the act expressly disavows any such purpose. Section 15 is as follows:

“Nothing in this act shall be construed to amend, repeal, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds. (March 21, 1918, C. 25, Sec. 15, 40 Stat.)”

We do not see how it could be made any clearer that the railroads and transportation systems while under Federal control were not only to be subject to all laws and liabilities as common carriers under state laws, as provided in Section 10, but that nothing in the statute should be construed to amend or repeal said laws, or impair or affect the lawful police regulations of the states, save in the excepted cases where such laws, powers or regulations may affect the transportation of troops, war materials, government supplies or the issue of stocks and bonds.

A review of several leading cases decided by the Supreme Court of the United States will aid us in the interpretation of this statute.

In *Railroad Company v. Peniston*, 18 Wall. 5, the railroad was incorporated during the Civil War and was considered a necessity to the successful prosecution of the war by the Union. By the act approved July 1, 1862, congress incorporated the Union Pacific Railroad Company with authority to build a continuous railroad and telegraph as far west as Nevada. An extensive grant of land was made to the company as well as a right of way through public lands. The act declared the purpose of the grant to be upon condition that the company transmit dispatches over the telegraph lines and transport mails, troops and munitions of war, supplies and the public stores upon said railroad for the government. The State of Nebraska laid a tax upon the property of the railroad company. When Peniston, the treasurer of Lincoln County, at-

tempted to collect the tax, the railroad company brought an action to restrain him from doing so, and an appeal was taken to the United States Supreme Court on the ground that the tax was invalid because the property of the railroad was exempt from taxation by virtue of the Federal incorporation as a means for performing the duties of the Government. The court held that the railroad and telegraph lines were private property and that their use in government service both *military* and postal, did not exempt them from state taxation. The court rested its decision on the ground that the tax upon the property of the railroad, the agent of the government, did not necessarily deprive the railroad of its power to serve the government as it was intended to serve it, or hinder the efficient exercise of its power. The tax left it free to discharge the duties it had undertaken to perform.

In *Reagan v. Mercantile Trust Company*, 154 U. S. 413, it was decided that the fact that the Texas & Pacific Railway Company was an incorporation organized under the statute of the United States, receiving therefrom the corporate power to charge and collect tolls and rates for transportation, did not remove that company from the operation of the Act of the Legislature of Texas of April 3, 1891, establishing a railroad commission as to business done wholly within the state; but such business is subject to the control of the state in all matters of taxation, rates and other police regulations.

Mr. Justice BREWER in delivering the opinion of the court at page 416, says:

“Similarly we think it may be said that, conceding to congress the power to remove the corporation in all its operations from the control of the state, there is in the act creating this company nothing which indicates an intent on the part of congress to so remove it, and there is nothing in the enforcement by the state of reasonable rates for transportation wholly within the state which will disable the corporation from discharging all the duties and exercising all the powers conferred by congress. By the act of incorporation congress authorized the company to build its road through the state of Texas. It knew that, when constructed, a part of its business would be the carrying of persons and property from points within the state to other points also within the state, and

that in so doing it would be engaged in a business, control of which is nowhere by the Federal Constitution given to congress. It must have been known that, in the nature of things, the control of that business would be exercised by the state, and if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear. Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the state, it intended that it should be subjected to the ordinary control exercised by the state over such business. Without, therefore, relying at all upon any acceptance by the railroad corporation of the act of legislature of the state, passed in 1873 in respect to it, we are of the opinion that the Texas & Pacific Railway Company is, as to business done wholly within the state, subject to the control of the state in all matters of taxation, rates, and other police regulations."

In *Smythe v. Ames*, 169 U. S. 466, Mr. Justice HARLAN in delivering the opinion of the court at page 519, says:

"It is contended that the state is without power to fix or limit the rates that the Union Pacific Company may charge for transportation of freight on its lines between points within Nebraska. This contention rests: 1. Upon the provisions of the acts of congress showing that the Union Pacific Railroad Company was created for the accomplishment of national objects, namely, to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores of the United States; 2. Upon the eighteenth section of the above Act of July 1, 1862, 12 Stat. 489, 497, c. 120, providing that 'whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law.' The argument is that congress by this enactment has reserved to itself exclusive

control of rates, interstate and local, to be charged on the Union Pacific Railroad. As this view, if maintained, would require an affirmance of the degree so far as the Union Pacific Company is concerned, whether the Nebraska statute of 1893 be constitutional or not as to the other railroad corporations, it cannot properly be passed without examination."

And at page 521:

"Undoubtedly congress intended by that act to reserve such power as was necessary to prevent the corporation from exacting rates that were unreasonable. But this is not equivalent to a declaration that the states through which the railroad might be constructed should not regulate rates for transportation begun and completed within their respective limits.

"It cannot be doubted that the making of rates for transportation by railroad corporations along public highways, between points wholly within the limits of a state, is a subject primarily within the control of that state. And it ought not to be supposed that congress intended that, so long as it forbore to establish rates on the Union Pacific Railroad, the corporation itself could fix such rates for transportation as it saw proper independently of the right of the states through which the road was constructed to prescribe regulations for transportation beginning and ending within their respective limits. On the contrary, the better interpretation of the Act of July 1, 1862, is that the question of rates for wholly local business was left under the control of the respective states through which the Union Pacific Railroad might pass, with power reserved to congress to intervene under certain circumstances and fix the rates that the corporation could reasonably charge and collect. Congress not having exerted this power we do not think that the national character of the corporation constructing the Union Pacific Railroad stands in the way of a state prescribing rates for transporting property on that road wholly between points within its territory. Until congress, in the exercise either of the power specifically reserved by the eighteenth section of the Act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the states through which the road passes to fix rates for transportation beginning and ending within their respective limits."

It thus is established by the highest authority that railroad companies although incorporated by the Federal Government, receiving therefrom the power to collect tolls and rates for transportation, and building their roads with its assistance under the war power to secure the speedy transportation of troops, munitions and supplies, congress reserving the right under certain circumstances, to fix and establish the rates of fare, are not exempt from state taxation and are subject to the power of the state through commissions to establish and regulate rates for transportation wholly within their borders, unless congress in the exercise of its reserve power withdraws the roads from state control "in language whose meaning would be clear."

There is no such evidence of the withdrawal of the transportation systems from state control and we are led to the conclusion that the Director General and his subordinates are operating the railroads in the place of the corporate officers and are subject to the same provisions of law, except for military necessities, and where the act provides other regulations and procedures; that the purpose of the act is to leave in the hands of the states and the agencies created by the states all the power and authority over intrastate railroad operations they possessed before its passage, except those affecting the transportation of troops, munitions and supplies and the issuance of stocks and bonds. Now it cannot be said that the lowering of freight rates on coke from the Klondike region to Monessen and on coal within a radius of seven miles to Monessen, would "affect" the transportation of troops, war materials or supplies, or, as a matter of course and without demonstrating the fact, that it would "affect" the issuance of stocks and bonds. Removed then from the saving clause of the 15th section of the act, it is clear that the regulation of these rates which is an exercise of the police power of the Commonwealth, is vested in this Commission, and that whether the rates complained against were fixed by a tariff by the defendant or initiated by the Director General of Railroads, we have the power to review them.

The Director General is no party to these proceedings although he initiated two of the rates complained against. So far as the orders of this Commission regulating transportation charges of railroad companies for intrastate business can be enforced against the companies, they can be enforced against the Director General,

who is now in charge of and operating the roads for the owners.

The motion to dismiss the complaints is overruled, the cases are set down for further hearing, of which notice will be served upon the operating officials of the defendant companies operating for the Director General.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer (in the nature of a demurrer) on file, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had; and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon which said report is hereby approved and made part hereof:

Now, to wit, January 14, 1919, the motion to dismiss complaints for want of jurisdiction is overruled; and

It is ordered and directed that the cases be set down for further hearing, of which notice will be served upon the operating officials of the defendant companies operating for the Director General of Railroads.

By the Commission,
WM. D. B. AINEY, *Chairman*.

IN RE CONTRACT BETWEEN THE CITY OF PHILADELPHIA AND THE
PHILADELPHIA RAPID TRANSIT CO.

Municipal transit facilities—Contract for operation of.

The contract for which approval was sought provided for the operation of the transit facilities of the City of Philadelphia by the Philadelphia Rapid Transit Co. The agreement was entered into pursuant to the Act of June 17, 1913, P. L. 520, and must be approved by the Public Service Commission under the Act of July 26, 1913, P. L. 1374. Such approval can be given "only if and when the said Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public."

The Commission, after frequent hearings, found that the approval of the contract was not necessary or proper for the service, accommodation, convenience or safety of the public and accordingly refused to approve the same.

MUNICIPAL CONTRACT DOCKET No. 831—1918.

Report and Order of the Commission.

Wm. Draper Lewis, for the City of Philadelphia.

Ellis Ames Ballard, for Philadelphia Rapid Transit Co.

Thos. Rayburn White, for A. M. Taylor.

Edw. M. Abbot and *C. Oscar Beasley*, for United Service Business Men's Assn.

C. Oscar Beasley and *Edward B. Martin*, for W. Phila. Business Men's Assn.

C. Oscar Beasley, for Overbrook Assn. and Cliveden Improvement Assn.

Edw. B. Martin, for West End Business Assn.

Geo. W. Kelley, for certain protestants.

AINEY, Chairman, Jan. 15, 1919:

This is an application of the City of Philadelphia in which the Philadelphia Rapid Transit Company joins for a Certificate of Public Convenience, approving a contract between the said city and the Philadelphia Rapid Transit Company for the operation of the city's transit facilities.

The agreement is in pursuance of the Act of June 17, 1913, P. L. 520, authorizing cities of the first class to construct transit facilities and operate or lease them. The act empowers the city to lease the transit facilities upon such terms and conditions, including the prescribing and fixing of rates for transportation as the councils shall determine.

The Philadelphia Rapid Transit Company operates lines of railways, surface, subway and elevated, in the City of Philadelphia, and from its last report apparently earns more than sufficient revenue after paying operating expenses to provide for all its fixed charges and pay a dividend of five per cent. upon its capital stock.

Though the Act of 1913 invests the city with full power to determine its terms and conditions, the contract must be approved in conformity with the Act of July 26, 1913, P. L. 1374, by this Commission. The approval of the Commission can be given "only if and when the said Commission shall find or determine that the

granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public."

In view of the duty placed upon the Commission and in order to reach a proper conclusion, the Commission held a number of hearings at which evidence was submitted by the applicant and by protestants and oral arguments were presented and printed briefs filed—the latest data being the detailed audit of the financial reports for a period of years ending June 30, 1918, which was furnished to us on January 7, 1919. After due consideration, the Commission finds that the approval of this application is not necessary or proper for the service, accommodation, convenience or safety of the public and the contract therefore is not approved.

Under the evidence presented the Commission is of opinion that a unified system operated by the Philadelphia Rapid Transit Company would accommodate the public and give better service than separate operations by the city and the company.

The action of the Commission in refusing the application was unanimous and while other objections were advanced, which to some of the commissioners are controlling, the following seem vital to the majority:

1. The sums mentioned in Item 6, Article XX, should not be postponed in payment as set forth in Clause 2 of that article, and should be cumulative, as are the payments mentioned in Items 2, 3, 4, and 5. The taxes on dividends and the payments on account of paving are obligations of some of the underlying companies in accordance with their charters or acts of assembly. These sums are now treated as fixed charges and should be paid before any dividends are declared.

2. The Commission cannot approve of the method proposed for increasing or lowering the rate of fare. To so do would in effect be determining that the initial rate is just and reasonable. This the Commission declines to do except in accordance with the methods and upon consideration of the principles recognized by the Public Service Company Law.

3. The provisions of Article XXII as to the custody and control of funds, A and B, do not meet with the Commission's approval. The depreciation reserve funds A and B are for the maintenance of the city's transit facilities. These funds will be the property of the City of Philadelphia. They should be deposited

with the city treasurer or the sinking fund commissioners, as councils may determine, and should be invested in legal securities so as to be available at all times for repairs, replacements and renewals, but should not be invested in the bonds, notes or other securities of the Philadelphia Rapid Transit Company, as provided in the proposed lease or contract.

4. The Commission will not now approve any contract which would be in effect on approval of the contract of 1907. The latter is not before the Commission, and having been entered into prior to 1913 does not require the Commission's approval and the Commission will not in any indirect manner give its approval to that contract.

The proposed contract in the particulars herein mentioned does not meet with the Commission's approval and an order will be made refusing the application.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition and protests on file and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, January 14, 1919, It is ordered: That the petition in this case, and the approval of contract prayed for, be, and the same are hereby refused.

By the Commission,

WM. D. B. AINEY, *Chairman.*

Commissioner Rilling's concurring report follows.

CONCURRING REPORT OF COMMISSIONER RILLING.

There is no controverting the fact that the great and growing City of Philadelphia is in urgent need of an extended, efficient and up-to-date transit system whereby the public may, by paying a reasonable fare, be afforded safe rapid transit facilities. There is

no municipality where local conditions are more inviting or permit an efficient paying transit system to be constructed and operated with less onerous engineering difficulties to contend with. The return to the owners we believe will be assured if it is economically operated and they are content with a fair return upon a proper valuation of their property. We concur in the order made by the Commission disapproving the proposed contract made between the City of Philadelphia and the Philadelphia Rapid Transit Company, and on account of the importance thereof deem it proper to further set forth our reasons for so doing.

The so-called lease in our opinion is not really a lease. The city does not thereby let any property to the company, neither does the company in any manner or at any time agree to pay to the city a single penny as rental for property leased to it. The proposed contract provides in general that the city shall at its own cost and expense construct certain lines costing upwards of one hundred millions of dollars, and when completed turn the same over to the company to be operated by it jointly with its own property as a unified system, the earnings thereof to be applied as therein specified. It partakes more of the character of a copartnership agreement wherein each of the parties contribute certain property and agree to a division of the profits. Its approval would result in an entangling alliance between the city and company productive of litigation, loss and expense to the city without conserving the public welfare.

Out of the gross revenue of the unified system (bearing in mind this includes earnings on city property) there is to be paid eight items set forth in Article XX, paragraph 1, as follows:

Item 1. Operating cost, maintenance and damages. (The Commission has had no information whether these items are reasonable or not.)

Item 2. All taxes and charges of every kind which the city or the company may be required to pay to any constituted governmental authority, except taxes on dividends *payable by the company to the city*, which are included in Item 6.

Item 3. All payments in the nature of fixed charges for which the company shall be obligated under any mortgage, lease, or other

form of contract, to be ascertained by an audit therein provided for.

Item 4. Interest and sinking fund payments on new securities and dividends and sinking fund payments on new capital stock of the company.

Item 5. Payments into depreciation reserve funds.

Item 6. Sinking fund payments required under Section 9 of the 1907 contract; payments due the city for taxes on dividends to stockholders of subsidiary lines as imposed by the charters of the respective companies; and all payments due the city under Section 10 of the 1907 contract in lieu of paving, repaving and repair of occupied streets, snow removal and car licenses.

It is important to observe that all payments in Item 6 go to the city, are of large amount, and therefore are an important part of its revenue. The sinking fund is not an exception, the right being reserved by the city in the 1907 contract at a time therein specified to require that sum and all further payments to be turned over to the city and become its absolute property.

Item 7. After the payment of the foregoing six items, the balance of gross revenue of the unified system becomes *current net revenue*, from which the company shall pay to the city five per cent. on its investment in transit facilities, and five per cent. on the company's capital stock *fixed at \$30,000,000*.

Item 8. Payment to the city equal to the difference between the five per cent. paid to the city on its investment and the total amount of interest and sinking fund charges on such investment in transit facilities.

All the above payments are made subject to the following conditions, to which we desire to call especial attention. Article XX, paragraph 2:

"The foregoing payments under the various items shall be cumulative. Payments under Items Nos. 1 to 5, inclusive, shall be cumulative in the order named and shall be made before any application of gross revenue in subsequent years to current payments."

"If after application of all current revenue and the use of new and initial surplus as provided in paragraph 3-b hereof, there shall remain in any year a deficit in respect to payments due under Items 6, 7, and 8, the same shall

not be made up out of subsequent current gross revenue until all current payments in any year shall have been made and the company's initial surplus restored to the extent that it has been depleted by payments under paragraph 3-b hereof."

Then follows that to which we make serious objection. Mark the language:

"Thereafter any deficits in Item 7 shall be made up before deficits in Items 6 and 8."

The preferred Item 7 is a return upon the investment of the city, also five per cent. payable to the company on the arbitrarily fixed value of \$30,000,000 representing its stock, whereas the deferred Items 6 and 8 cover charges for large amounts accruing to the city, and if paid become a part of its revenue.

The preference here given to dividends to be paid on the company's stock is specifically prohibited by the 1907 contract, now effective, as to the sinking fund payments. The prohibition is found in Section 9 and is as follows:

"These payments shall be treated by the company as fixed charges reducing the income applicable to dividends to its stockholders and to the city; and no dividends shall be payable to stockholders or distribution of surplus earnings made to the city as long as any such payments shall be in arrears."

It will thus be observed that if at any time the revenue shall not be adequate for all charges (and in this respect it should be borne in mind that its conservation through economy in management lies with the company) the payment of these large amounts of fixed charges for sinking fund, taxes and street maintenance, constituting city revenue, are set aside in order to pay a dividend to the holders of the company's \$30,000,000 of stock.

At this point it is well to call attention to the fact that the Commission has no knowledge or information as to what this \$30,000,000 represents, if anything. Neither does this proposed contract provide that such fact be established. The value of the company's used and useful property (the only property on which the law allows a return to be paid) may or may not be exceeded by the

extent of the prior liens and holdings. So that all that is required is a lack of net revenue, to permit the company to pay to its stockholders one and one-half millions of dollars per year in dividends, out of funds belonging to the city, and without any right whatever for the payment of a dividend to the company's stockholders having been established. This one provision, we contend, is such that it condemns the entire contract.

From the evidence adduced (Twining Exhibit No. 6), the total outstanding stock and bonds of the Philadelphia Rapid Transit Company's constituent companies held by the public on June 30, 1916, was \$94,269,663.00. The company pays annually to the public holdings for interest and dividends \$9,183,615.00. In addition to this the company by the proposed agreement proposes to add \$29,978,875.00 of its own capital stock and provide for the payment of five per cent. thereon. This would result in a total capitalization of \$124,248,838.00 with an annual charge against the public for return of \$10,682,559.00, making an average fixed charge of 8.6%. We should bear in mind that included in this capitalization there are outstanding bonds amounting to \$38,267,100.00 bearing a much less rate of interest, so that on the capital stock the dividends paid are much in excess of 8.6%. The evidence also discloses the fact that the company has in all 661 miles of single track. With this capitalization it would have a valuation of nearly \$200,000.00 per mile of track. Many streets have double track, and included in this trackage are the Market street subway and elevated lines. Should the Public Service Commission created by the legislature, vested with supervising authority to regulate the reasonableness of rates upon a fair value basis, be asked to approve a contract like the one before us without being furnished any evidence as to the value of the property? To ask such a question is to answer it. We do not desire in any manner to express any opinion as to the value of the system operated by the company, for we have not been furnished with any information upon which to base any opinion.

Whether these payments specified in the 1907 contract to be made to the city on account of its relieving the company from the payment and performance of lawful obligations are adequate in amount we need not determine. What we wish to call attention to is the fact that they and the other payments provided for in

paragraph 6 of the proposed contract are a source of revenue to the city of nearly a million dollars per year and annually increasing, and if not paid the city treasury is depleted to that extent.

In this manner the provisions of the proposed contract specifically provide that the revenues due to the city may under the conditions therein set forth be used to pay a return upon the stock of the company. We do not believe that the company should in this indirect manner be subsidized by the city. A provision in our Constitution prohibits a municipality from paying or appropriating any of its money or loaning its credit to a corporation. This provision in our opinion is violated by the foregoing terms of the proposed contract.

The Ohio Constitution contains a like provision. The Supreme Court of that state in *Walker v. Cincinnati*, 21 Ohio, page 14, said:

"The mischief which this section interdicts is a business partnership between a municipality or subdivision of the state and individuals or private corporations or association. It forbids the union of public and private capital or credit in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such a manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein."

Our own Supreme Court in *Brode v. Philadelphia*, 230 Pennsylvania, page 434, in which case it was considering the contract of 1907, quoted the foregoing with approval. In speaking of the 1907 contract our Supreme Court said:

"Passing from the preambles to the terms of the contract as they appear in its fifteen clauses, there is not to be found in any one of them a line which provides that during the period for which it is to run a dollar of the city's money, raised by taxation or otherwise, paid into the treasury, is to be obtained by or appropriated to the Philadelphia Rapid Transit Company."

Here the court indicates as clear as language can express it that had the contract of 1907 contained any such provisions as are

found in the contract now under consideration, it would have held the same to be illegal.

Continuing, the court in said case on page 453, said:

"The city and the company could not become partners, for neither possessed the corporate power to enter into a partnership with any one, and of this all the world must take notice in dealing with either."

If it should be urged that the earnings of the unified system may be sufficient that it will at no time be necessary to withhold the city's payments in order to pay the five per cent. dividends on the company's stock, our reply is that it need not be demonstrated to a certainty that such a result will follow. If it is possible to occur, such a possibility is sufficient to condemn the contract.

We must also consider that bonds are to be issued by the city for the entire cost of the city lines on which interest and sinking fund charges are paid from city revenue.

If the city does not receive from the earnings of its lines these charges a result that we fear would occur under the provision of the contract then the city would be devoting its property for the benefit of the company.

The contract creates a board to assist in the supervision and operation of the unified system. In Article XXXI, Section 7, it provides that the board shall not deprive the company's officers and directors of the management of the company's property, nor shall anything therein contained be deemed a delegation of power vested by law in the director or commission. Notwithstanding this provision, the contract does in Section 3 of the same article explicitly delegate to the board certain powers and rights that are vested in the company and the Commission. It grants to the board the right to pass upon, adopt and alter rules and standards of maintaining service; routing, as well as adequacy and suitability of equipment; to establish, omit or change starting and stopping points on all lines. These and other matters therein delegated to the board are vested in the company and the Commission, and if valid necessarily must be concurrent with and not superior to the rights of the company and the powers of the Commission. Suppose any order made by the board should conflict with the Commission or be deemed improper by the company;

which would control? And what an unfortunate situation would thereby be created.

This board is so constituted that it presents great opportunity for manipulation. Its existence in our opinion is inimical to the best interests of the City of Philadelphia. If the lines to be constructed by the city are to be operated with the property of the company's as a unified system by the company, the duty of the company to render adequate service is no greater nor less than that of any other public utility, and the fact that part of the system is owned by the city can furnish no excuse for the creation of such a board. The law has provided a method for supervising the affairs of the Philadelphia Rapid Transit Company as well as every other public service company in the State. Until that method has proven inadequate it should be permitted to prevail. When it no longer meets the purpose for which it was intended, then it should be replaced by such other supervising authority through proper legislation as will meet the desired end.

Why should not the Philadelphia Rapid Transit Company in the first instance, at least, like every other utility in the State, be given the opportunity to demonstrate its ability to manage its own affairs? Why should it be singled out from all others and placed under the supervision of a board of this kind? If in the future it fails to perform its duty, it will then be ample time to visit it with such a supervision as its then shortcomings may require. The present management of the company deserves credit for what it has accomplished under most trying conditions with the means at hand. It was asked to assume management of the company's affairs when they were in a deplorable condition.

Another objection to be urged against the proposed contract is that it arbitrarily provides that if increased revenues are needed (which increase is determined by the company), the fares shall be increased, and if at any time the revenues are more than required (still under the management of the company), the fares are to be reduced, thereby assuming that increased fares will produce increased revenue and reduced fares will show a reduction. Can such an assumption be accepted as correct? We think not. It is at variance with experience and sound economics. There is in the operation of every company a certain fare to be ascertained by careful study and tests, which will provide the maximum net

revenue for the company. This fare may fluctuate as the conditions under which the company operates vary. A reduction in fares may increase the net revenue and an increase lessen the same.

We are bold enough to venture the prediction that considering all the conditions under which the unified system when completed will operate in Philadelphia, under normal conditions, the maximum net revenue (the amount remaining after the payment of all proper cost to operate and maintain the system economically) would be produced by adopting a straight five-cent fare within the limits of Philadelphia, with free transfers. Such fares will greatly stimulate traffic, especially short riders, who are the most profitable to the company. The increased facilities and operating cost required to serve the increased travel would be more than overcome by the augmented revenue. More than that it would result in rendering the best service to the public, and that, after all, is the first consideration. A five-cent fare would tend to prevent congestion in the housing conditions in the central portion of the city with all its accompanying evils, and would also develop and improve outlying districts, increasing values, thereby adding to city revenue. A careful reading of this contract cannot fail to impress us that the main thought before those who framed it was to produce revenue, and that the matter of service to the public was made secondary. This order, we think, should be reversed.

We do not know whether it is possible for the City of Philadelphia under any circumstances or conditions to contribute any part of its revenue in order to reduce street railway fares. If it can be done and the city desires from its general revenue to assist the car rider, we know of no better way to promote the public welfare than to let the city contribute to or wholly provide any deficiency that might arise or result from a five-cent fare on the unified system. That is, to let the city make up, in whole or in part, the difference between the net revenue produced by a five-cent fare under an efficient and economical management, and the amount of fair return herein indicated that the company would be entitled to receive. Such a provision, however, should not be provided for by a long term arbitrary agreement. Appropriations out of the public funds should be made, therefore, annually only after it has been demonstrated that the company has been eco-

nomically managed and that any deficiency of the character indicated really exists.

We need not comment upon the rentals payable by the company to the stockholders of its constituent companies under the provisions of the leases made whereby it is operating the same, which rentals it is claimed are in some instances at least excessive.

Whether such rentals are excessive or not, or if the leases providing for their payment are legal and binding, we need not determine. If such rentals, be they much or little, are to be paid, they should only be paid out of the fair return that the Philadelphia Rapid Transit Company is entitled to receive upon the fair value of the used and useful property in the system operated by it. When the company made these leases it assumed full responsibility therefor, which it cannot now shift and place upon the public. If any mistakes have been made they should be visited upon the company and not upon the car riders. The leases are for long terms and it would be highly improper if any excessive rentals should be paid by the innocent car riders. The law vests in the company the right to lease and operate lines of other companies. By so doing it succeeds to their rights and assumes their obligation. The company's entire system should be considered from the viewpoint that it is the owner thereof and, in determining its fair value, the property owned by the company, as well as that leased by it, should be considered as one, and a fair return allowed therein, out of which all charges and costs for operation, the amount to be set aside for depreciation, and fair return should be paid.

With the enactment of the Public Service Company Law in 1913 (and Pennsylvania was one of the last states in the Union to place such a law upon its statute books), there was provided and put into effect in our Commonwealth a state-wide system of public utility regulation, whereby all public service companies are in theory, at least, supposed to have their affairs supervised in order that they may render adequate efficient service to the public, in return for which they have a right to receive over and above their fair operating cost and a proper amount for depreciation, a fair return to the owners based upon the fair valuation of their used and useful property. This return, we think, should be not less than eight per cent. Under the provisions of the proposed con-

tract the State supervision of the affairs of the Philadelphia Rapid Transit Company is practically nullified. It is taken out from under the provisions of the Public Service Company Law and therefore to all intents and purposes repeals the same. Fares are raised without regard to the ascertainment of any of the values of the company and dividends are to be paid upon stock without knowing whether or not it represents property used and useful in the public service. Suppose the Commission were to approve the contract and thereafter a complaint should be made that the fares were excessive. In what position would the Commission find itself, having approved the contract with these rate regulation provisions therein?

Aside from the objections hereinbefore noted, we think this contract should be viewed and the wisdom of its approval determined from normal conditions, and the proper consideration of the possible future growth and development of the city, giving due weight to what has occurred in the past. If the City of Philadelphia desires to enter upon the policy of municipal ownership of transit facilities, as it seems to have done, and the wisdom of which we are not convinced, and does not desire to operate such facilities, let it make a lease thereof for a definite period, providing for a fixed return, making the terms thereof elastic enough to meet conditions as they arise, and which cannot possibly be foretold, with a mutual right therein vested in both parties to terminate the same at certain stated periods upon giving due notice to the other.

Commissioner McClure's concurring opinion follows:

CONCURRING OPINION OF COMMISSIONER MCCLURE.

A unified system of transportation in the City of Philadelphia, such as is provided for in this contract, is agreed all around to be a most desirable accomplishment. I would not withhold approval of a contract merely because one party to it would gain what we might consider to be an advantage over the other. This is a business venture, undertaken by two corporations who, with the advice of able counsel, were dealing with each other at arm's length. Many problems arose, most difficult of solution. This contract is the result of long negotiations and both parties are con-

tent with its terms. Microscopical defects should not be sought, and if found not be permitted to stand in the way of its approval.

I am not jealous of the supervisory board created by the contract. No powers could be conferred upon it that would interfere with the jurisdiction of this Commission. The terminology gives me no concern. Whether the instrument be a lease or a contract or a lease and contract is of no moment.

To me the objectionable features of the agreement are the attempt to have this Commission by indirection approve the contract of 1907 and the provisions for the revision of fares. These directly concern the general public, the car rider whose interests it is our duty to protect. Our approval would evidence our assent to all the rentals and other obligations of the transit company to its underlying companies amounting to \$7,365,900 per annum, being used in the making of a rate base regardless of the real value of their properties used and useful in the transportation of passengers. Here a base for the determination of just and reasonable rates of fare not recognized by the law is attempted to be set up by contract.

Undoubtedly upon our approval the parties would act on the faith of the provisions of the contract. And yet there is nothing in the contract and nothing could have been put into it which would prevent this Commission at any time in the future upon complaint made from fixing a just and reasonable rate of fare, and this rate would be necessary, under the law, be based upon the fair value of its property and not upon the contract obligations of the Rapid Transit Company to its underlying companies. Our approval would be a vain thing and would mislead the parties to their injury. Hence the application is properly refused.

BEDFORD-FULTON TELEPHONE COMPANY v. CHAPMANS RUN MUTUAL TELEPHONE CO.

Telephone companies—Competing in same territory.

When two telephone companies are lawfully operating in the same territory there is no authority in the Commission to prevent a patron from changing from one to the other.

COMPLAINT DOCKET NO. 2303.

Report and Order of the Commission.

Joseph P. Biddle, for complainant.

Simon N. Sell, for respondent.

RILLING, Commissioner:

The complainant, the Bedford and Fulton Telephone Company, an incorporated telephone company, operates in Bedford and Fulton Counties. It commenced operations about 1903, constructing and operating, among others, a line between Everett and Clearville, in Bedford County, over Dibert road so-called, a public highway, along which and adjacent thereto it had several patrons.

The complaint alleges that the respondent, the Chapmans Run Mutual Telephone Company, an unincorporated telephone company, was invading the territory, which complainant by its charter had an exclusive right to serve, by installing telephones in residences of parties residing along and in the vicinity of the said Dibert road, which had theretofore been or were being served by complainant.

The testimony discloses the fact that the respondent also built its line along the said Dibert road in 1907, and had since that time been serving its patrons along the same and in the vicinity thereof.

During 1918, five of the patrons of complainant residing along said Dibert road, or in its vicinity, discontinued their service. Some of these have since become subscribers of respondent. One or more of them testified that they made the change in order that they might communicate with parties not reached by complainant's lines. It further appeared that respondent did not solicit said parties to become its patrons.

Under this state of facts, the complaint as filed in this case must be dismissed. Both complainant and respondent had, prior to the

enactment of the Public Service Company Law, on July 26, 1913, constructed their lines along said Dibert road and were serving patrons therefrom. Certain patrons of complainant company discontinued their service with it and become patrons of respondent, giving their reasons for so doing. Where two telephone companies are operating in the same territory there is no authority in the Commission to prevent a patron from changing from one to the other. An order dismissing the complaint will issue.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, December 10, 1918, It is ordered: That the complaint in this case be and the same hereby is dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

SUPERIOR COURT.

SCHUYLKILL LIGHT, HEAT & POWER CO., APPELLANT, *v.* PUBLIC SERVICE COMMISSION, APPELLEE, AND EASTERN PENNA. LIGHT, HEAT & POWER CO., INTERVENOR.

Public Service Commission—Jurisdiction of—Approval of ordinance.

The Public Service Commission has jurisdiction under Article III, Section 11, of the Act of July 26, 1913, P. L. 1374, to approve or disapprove a borough ordinance granting municipal consent to an electric light company to use the streets of the borough.

The appellant, having submitted the matter to the Commission for disposition, may not on appeal, question its right to determine the same.

In the Superior Court of Pennsylvania. No. 29, March Term, 1918. Appeal by plaintiff from order of Public Service Commission. Affirmed.

Arthur L. Shay and *C. A. Snyder*, for appellant.

Otto E. Farquhar, *Jos. DeF. Junkin*, and *F. C. Newburg, Jr.*, for intervenor.

Berne H. Evans, for the Commission.

WILLIAMS, J., April 22, 1918:

The Schuylkill Light, Heat & Power Company filed, August 19, 1913, an application with the Public Service Commission for the approval of an ordinance, passed August 16, 1913, by the Borough of Ashland, granting the company the right to furnish light, etc., therein. The Eastern Pennsylvania Light, Heat & Power Company filed a protest, alleging that it, and its predecessors in title, had been, since 1884, lawfully supplying the borough with electric current for various purposes; and there was no necessity for, nor business enough therein, to warrant two companies.

The Commission, after a hearing, found, inter alia, that the protestant's plant was adequate, its prices reasonable, and service reasonably satisfactory; that it had operated for many years, with municipal acquiescence and assent, although no ordinance had ever expressly granted the privilege; and that it would not be beneficial to the public to grant the petition. From the orders dismissing the petition and refusing a rehearing, entered respectively April 9 and May 22, 1914, we have this appeal.

The evidence sustains the findings of the Commission, and we have but to ascertain whether its action in refusing the petition was reasonable.

We cannot agree the Commission had no jurisdiction. Appellant selected the forum and, upon an adverse judgment, cannot be heard to complain there was no power to dispose. *Dock v. Cauldwell*, 19 Pa. Superior Ct. 51. Nor would jurisdiction be lacking under Art. III, Sec. 11, of the Public Service Commission Act, which became operative July 26, 1913, as the ordinance was, for the purpose of this section, a municipal contract. Counsel for appellant lay stress upon the fact that the Schuylkill company was operating in Ashland before the passage of the act. Our decision

does not affect operation, as the orders appealed from only refuse to sanction an extension thereof under the borough ordinance.

We need not consider whether the Schuylkill company is entitled to operate in Ashland under its charter, a fact denied by protestant; or the Eastern company entitled to operate therein by reason of municipal acquiescence, evidenced by twenty-nine years' uninterrupted operation, a position as earnestly denied by petitioner.

The orders of the Public Service Commission are affirmed and the appeal dismissed at the cost of appellant.

COUNTY COURT OPINIONS.

COMMONWEALTH OF PENNSYLVANIA *v.* DELAWARE, LACKAWANNA
& WESTERN RAILROAD COMPANY.

*Bonus—Increase of capital stock—Act of May 3, 1899, P. L. 189
—Impairment of obligation of contract.*

No bonus may be charged or collected by the Commonwealth for an increase of capital stock made pursuant to authority conferred prior to the passage of the Act of May 3, 1899, P. L. 189. To hold otherwise would impair the obligation of the charter contract of the defendant in violation of Section 10, Article I, of the Federal Constitution.

In the Court of Common Pleas of Dauphin County. No. 66, Commonwealth Docket, 1912. Appeal from settlement on bonus for increase of capital stock.

John C. Bell, Attorney General, for the Commonwealth of Pennsylvania.

Hause & Baker, for the defendant.

KUNKLE, P. J., Dec. 28, 1918:

This is an appeal from the settlement of an account against the defendant company for bonus on the increase of its capital stock. It has been submitted to us for trial without a jury. The facts are not in dispute. We find them as indicated in our answers to the defendant's requests for findings of fact filed herewith.

DISCUSSION.

The claim for bonus is made under the provisions of the Act of May 3, 1899, P. L. 189, as construed in *Commonwealth v. Independence Trust Company*, 235 Pa. 92. The defendant denies liability under the ruling in *Commonwealth v. Railroad Company*, 207 Pa. 154. It also contends that to charge it with bonus would be to impair the obligation of the contract contained in its charter in violation of Section 10, Article I, of the Constitution of the United States.

The defendant is a corporation formed by the merger and consolidation of three railroad companies, the Lackawanna & Western Railroad Company, formerly the Liggetts Gap Railroad Company, the Delaware & Cobbs Gap Railroad Company, and the Lackawanna & Bloomsburg Railroad Company. By Section 13, of the Act of April 7, 1832, the act incorporating it, the Liggetts Gap Railroad Company was authorized to enlarge its capital stock from time to time, if necessary to fulfill the intentions of that act. It was also authorized in Section 32, to increase its capital stock, if the original amount authorized was found to be insufficient to complete the work of constructing and equipping its road. These two sections we think must be construed together and mean that the defendant company was authorized to increase its capital stock to an amount necessary to build and equip its road. The right to increase its capital stock was extended by the Act of March 11, 1853, P. L. 163, by which the Cobbs Gap Railroad Company was merged into the Lackawanna & Western Railroad Company, to the construction and repair of the whole line of the road as lengthened by the merger. The defendant company contends that this gave the latter company the right to issue capital stock without limit. We are not satisfied this is the proper construction of the statutes. We think that when the whole line of the road of the two companies was repaired and constructed and equipped to completion the right to increase the capital stock was exhausted.

However, be that as it may, the defendant company does not rely solely for its right to increase its capital stock upon the two acts of assembly referred to. It bases its right upon the Act of March 24, 1865, P. L. 43, a supplement to the Act of February 19, 1849, the rights and privileges of which latter act were conferred

upon the Delaware & Cobbs Gap Railroad Company by the special Act of April 7, 1849, Appendix P. L. 1859, 757, and upon the Lackawanna & Bloomsburg Railroad Company by its charter Act of April 5, 1852, P. L. 699. The supplement of 1865 provides that "any company incorporated under any law of this Commonwealth and having authority to construct a railroad or railroads within the same under the provisions of the general Act of the 19th of February, 1849, shall be and is hereby authorized, from time to time to receive subscription for and issue such additional shares of capital stock as may be necessary to construct and fully equip, with suitable locomotives, engines and rolling stock such railroad or railroads." By virtue of the Act of March 11, 1853, P. L. 163, merging the Cobbs Gap Railroad Company into the Lackawanna & Western Railroad Company, under the name of the Delaware, Lackawanna & Western Railroad Company, and of the Acts of May 16, 1861, P. L. 702, and March 24, 1865, P. L. 49, under which in 1873 the last named company and the Lackawanna & Bloomsburg Railroad Company were consolidated, the defendant acquired all the rights and privileges of its component companies, among which was the right to increase its capital stock from time to time for the purpose of constructing and equipping its road with suitable locomotives, engines and rolling stock conferred by the supplement of 1865. It is conceded that the increase for which the Commonwealth seeks to recover a bonus was issued for the purposes named in the supplement.

The facts in the present case are similar to those in the case of *Commonwealth v. Railroad Company*. There the company was authorized, by its charter, to increase its capital stock to \$60,000 per mile, and by the supplement of 1883 to an amount not exceeding \$150,000 per mile. Under the authority then granted it increased its capital stock by corporate action taken subsequently to the passage of the Bonus Act of 1899. In the present case the defendant company had authority acquired prior to the Act of 1899 from two of its component companies to increase its capital stock from time to time, for the purpose of constructing and fully equipping its railroad. This authority is found in the supplement of 1865; and the corporate action for the increase was taken subsequently to the passage of the Act of 1899. In *Commonwealth v. Railroad Company* it was said: "Corporations from which the

Commonwealth can, under the Act of May 3, 1899, exact bonus on capital stock and an increase thereof are first, those created after its passage; and second, those incorporated prior to its passage but authorized thereafter to increase their capital stock," and it was held that the railroad company was not liable for bonus on the increase which was authorized before, but actually made after the passage of the Act of 1899. That case was distinguished in *Commonwealth v. Independence Trust Company*, where it was said, referring to it: "The facts of that case differentiate it from the case at bar. It was there held that the railroad company had authority under its charter to increase its capital stock to \$150,000 per mile without the payment of any bonus * * *." The controversy in respect to which that was said, was over the rate of bonus to be paid, not over the liability of the company for bonus. Here also the question is one of liability only. As was said there of *Commonwealth v. Railroad Company*, so may it be said here of the defendant company, the facts differentiate it from *Commonwealth v. Independence Trust Company*. It is difficult to reconcile the two cases, both of which interpret the Act of 1899. In the one case the words "hereafter authorized" used in the act were held to refer to the legislation authorizing the increase of the capital stock; in the other, to the corporate action exercising the authority. However, they may be reconciled on the theory that the Act of 1899 was not intended to apply to the case of a corporation exercising the right granted by its charter to increase its capital stock, but only to such corporations as exercise the right under the general legislation of 1891, 1893, and 1901, fixing limitations upon the amount of capital stock to be issued, and that in making the increase by virtue of these acts the authority refers to the corporate action. As we must make choice between the two cases in determining defendant's liability for the bonus, we feel bound to follow *Commonwealth v. Railroad Company*, the facts of which are, as we have said, similar to the facts in the case before us.

Defendant further contends that if the Bonus Act of 1899 is held to apply to it, the act is unconstitutional, for the imposition of a bonus will impair the obligation of the contract contained in its charter. Here the claim is for a bonus, not a tax, between which there is an essential distinction, as pointed out in *Commonwealth v. Erie & Western Transportation Company*, 107 Pa. 112:

"A bonus implies a consideration for something conferred, and where the corporation receives nothing beyond what it possessed by its charter the legislature cannot exact an additional consideration." The right to increase its capital stock for the purposes for which the increase in the present case was made was granted to it without the payment of bonus. Such right is found in its charter contained in the supplement of 1865, in the certificates of merger and consolidation and in the legislation under which they were affected already referred to. An additional price not stipulated for when the grant was made cannot now be exacted.

The reserve power of the Commonwealth to revoke, alter or amend the charter of a corporation we do not think has any applicability here. The Bonus Act of 1899 makes no attempt to amend or alter the charter rights of the company. It, however, does exact from the defendant, if it is held to fall within its provisions, an additional consideration for a right theretofore granted to it by its charter.

CONCLUSION.

We therefore conclude:

1. The defendant, having increased its capital stock pursuant to the authority conferred upon it by the charter prior to the passage of the Act of May 3, 1899, and not under any authority acquired since its passage, the increase upon which the bonus is charged is not within the terms and intentment of the act and the act is not applicable to the defendant or to such increase.

2. If the Act of May 3, 1899, be so construed as to apply to the defendant company it would impair the obligation of its charter contract in violation of Section 10, Article I, of the Constitution of the United States.

3. The Commonwealth is not entitled to recover.

Accordingly, judgment is directed to be entered in favor of the defendant and against the Commonwealth, unless exceptions be filed within the time limited by law.

B. FRANK DAY *v.* THE BURGESS AND TOWN COUNCIL OF THE
BOROUGH OF LANSDALE, AND THE BURGESS AND TOWN COUN-
CIL OF THE BOROUGH OF HATFIELD.

*Equity—Injunction—Boroughs—Municipal electric plants—Sale
of electricity for commercial purposes outside the borough
limits—Adjacent territory—Section 41 of Chapter VI, Article
XVII, of the General Borough Act of 1915, P. L. 312, con-
strued—Constitutionality of.*

A borough owning its own electric plant may not supply electricity for commercial purposes outside the borough limits to territory which is not adjacent.

Territory which is separated from the vendor borough by intervening townships or boroughs, is not adjacent territory.

To interpret Section 41 of the General Borough Act otherwise than as above would render it unconstitutional on the ground that the act contained more than one subject which was not clearly expressed in its title.

In the Court of Common Pleas of Montgomery County. Sit-
ting in Equity. No. 5 June Term, 1918.

*Ralph J. Baker and Evans, High, Dettra & Swartz, for com-
plainant.*

Samuel D. Conover, Solicitor, for the Borough of Lansdale.

A. Clarence Emery, Solicitor, for the Borough of Hatfield.

SWARTZ, P. J., Nov. 4, 1918:

The Borough of Lansdale owns and operates an electric plant and proposes to transmit and deliver electricity to the Borough of Hatfield, and to transmit and distribute electricity to the Borough of Chalfont, in pursuance of contracts made with the said boroughs.

The plaintiff, a tax payer of the Borough of Lansdale, contends that the said borough has no authority to supply electricity to the Boroughs of Hatfield and Chalfont, because they are located beyond the borough limits of Lansdale. The latter borough answers, that it does possess such right, under Chapter VI, Article XVII, Division "B," Section 41, of the Act of May 14, 1915, P. L. 312.

FINDINGS SO FACTS.

1. The Borough of Lansdale was incorporated under the General Borough Act of April 3, 1851, P. L. 320. It has a population of about four thousand, and is bounded by the following townships: On the north by Hatfield Township and Montgomery Township, on the east by Montgomery Township, on the south by Upper Gwynedd Township, and on the west by the Township of Hatfield and the Township of Towamencin.

2. The Borough of Hatfield was also incorporated under the General Borough Act of 1851. The borough limits of Lansdale are about two and one-half miles distant from the nearest boundary line of the Borough of Hatfield. The Township of Hatfield intervenes between the said boroughs.

3. The Borough of Chalfont is located in the County of Bucks, and the distance between the borough limits of Lansdale and the nearest boundary of Chalfont is about seven miles. A direct line drawn from Lansdale to the Chalfont Borough would pass over Hatfield Township, then across the county line and pass over part of New Britain Township, in Bucks County.

4. The territory surrounding Lansdale is mainly a farming community, but there are boroughs, numerous towns and villages within a radius of seven miles from Lansdale. There are some manufacturing plants and establishments located near to but beyond the Lansdale Borough limits. A few are also found more distant from the said borough, but located within the four townships that abut on the borough.

A few villages and settlements are found in localities not so far removed from Lansdale as is the Borough of Hatfield. The Boroughs of North Wales and Hatfield are each about equi-distant from Lansdale. The village of Colmar and the Borough of Hatfield are also about the same distance from Lansdale.

The territory surrounding Lansdale, within a radius of seven or seven and one-half miles, would contain about 175 square miles, or a tract equivalent to about one-fourth the surface of Montgomery County.

5. The Borough of Lansdale is now furnishing electricity to a number of residents within the said four townships, adjoining the

borough. The Zurn line runs into Montgomery Township and is one and one-half miles long.

The Hospital line enters the same township and is six-tenths of a mile long.

The Orvilla line runs into Hatfield Township, and is about two miles long; the Gun Club line is one-half mile long; the Pembroke line is six-tenths of a mile long; the Foundry line has many branches, the longest is one-half mile; the Farmers' line is three and seven-tenths miles long, and the Kulpville line, in Towamencin Township, is 2.2 miles long and branches from the Farmers' line.

Some of these lines are owned by the Borough of Lansdale, others were constructed by the consumers, and still others are owned in part by the borough and in part by the consumers along the line. Some of these lines were operated by Lansdale Borough as early as 1912.

6. The contract in evidence between the Borough of Lansdale and the Borough of Hatfield, as well as that with the Borough of Chalfont, shows the first attempt, on the part of the Borough of Lansdale, to supply electricity to a municipality located beyond the limits of the townships adjoining the Borough of Lansdale. At least our attention has not been called to any operation from the above existing electric lines that extends beyond the limits of the said four townships.

7. The contract made with the Borough of Hatfield, on the fourth day of February, 1918, provides, *inter alia*, That the Borough of Lansdale will supply electrical current to the Hatfield Borough and charge for light at the rate of three and one-half cents per kilowatt hour, and for power at three cents per kilowatt hour. The amount of current consumed is to be determined by a meter furnished by the Hatfield Borough and placed in its sub-station. The transmission lines, lamps and equipment of all character used within the latter borough are to be furnished by it.

Lansdale is to construct the pole lines and all equipments to transmit and deliver the current from its plant to the sub-station in Hatfield Borough.

There was a further consideration furnished by Hatfield Borough. It is the owner of a pole line fully equipped running from the limits of Souderton Borough to the boundary of Hatfield

Borough. The latter was to grant and convey all its interest in this line to Lansdale to recompense said borough for the initial cost of building the new transmission line from Lansdale to Hatfield Borough. Lansdale proposes to take up and remove this Hatfield pole line and then use the material in constructing its new transmission line to Hatfield Borough.

This contract is to continue in force for ten years, and provides further that Lansdale should have the exclusive right to furnish electricity to the Borough of Hatfield, during the life of the contract. The latter borough also agreed, that it would not, during the life of said contract, grant to any other person, copartnership, corporation or joint stock company a franchise to furnish electricity to any or all persons, etc., living or doing business within the limits of the said borough. Under certain breakdowns, Lansdale must pay a penalty of five dollars per day for not supplying current.

8. Lansdale, on the 28th day of November, 1917, made a contract with the Borough of Chalfont, in Bucks County, to furnish electric light for its streets and electric light heat and power to the inhabitants of the borough.

Under this contract, Lansdale Borough undertakes to provide electric light, heat and power, without the assistance of the Chalfont Borough. It proposes to deal directly with all consumers of electrical current and charges the borough a fixed price for each street light furnished. Lansdale must provide all the poles and equipments, within the borough, as well as the line of transmission from Lansdale to Chalfont. This contract is to continue for fifteen years, and may be renewed from year to year thereafter, but it can not be terminated until the fifteen years have expired. The Borough of Chalfont also gives to Lansdale the exclusive right to furnish the electricity for Chalfont Borough and its inhabitants during the said term of fifteen years. This contract also provides for penalties against the Borough of Lansdale.

9. The transmission line from Lansdale to Hatfield Borough runs through the Township of Hatfield, while the transmission line to Chalfont Borough runs through the Townships of Hatfield and Montgomery, in the County of Montgomery, and from thence into Bucks County and through the Township of New Britain, in that county.

10. The Excelsior Electric Light, Power and Gas Company, incorporated under the laws of Pennsylvania, is authorized to supply electricity within the Borough of Hatfield and within the Township of Hatfield. It is supplying the Borough of Hatfield at this time with electric current over the line mentioned, running from the boundary limits of the Borough of Souderton to the Borough of Hatfield. The current so furnished is purchased by the borough.

The contract under which it now furnishes the current for light, power and heat expires on November 14, 1918. The Borough of Hatfield claims that the charges fixed or to be fixed by this company are in excess of the prices named in the contract with Lansdale. There is no testimony to contradict this averment.

The answer also avers that the said Excelsior company never secured the consent of the Borough of Hatfield to furnish electricity to the inhabitants of the said borough. There is no evidence to contradict this averment of the answer.

11. The bill states that the Philadelphia Suburban Gas & Electric Company, a corporation of Pennsylvania, is authorized to supply electricity to the inhabitants of the Township of Montgomery, and that it is now furnishing it to some of the inhabitants thereof. This is not denied, but it is alleged, that said company does not have the facilities to supply the electricity to the patrons in said townships now accommodated by Lansdale Borough. There is no testimony to contradict this allegation in the answer.

12. The Borough of Lansdale obtained permits from the Townships of Montgomery, Hatfield, and New Britain to construct pole lines through and over the said townships.

13. The said Borough of Lansdale also obtained a permit from the State Highway Commission for the construction of an electric line, from Montgomeryville to Chalfont, along the state highway between said points.

14. The Borough of Lansdale did not obtain a Certificate of Public Convenience from the Public Service Commission, for the furnishing of electricity under its contracts with the said Boroughs of Hatfield and Chalfont. The solicitor for the Borough of Lansdale called at the office of the Public Service Commission, and was informed by some one in attendance, at said office, that it was

useless to file an application for such certificate, because the Public Service Commission had no jurisdiction over the matter.

15. The Lansdale electric plant has the capacity at this time to generate 750 kilowatts of electricity. It uses 350 kilowatts to light the borough streets and supply its present customers and consumers within and without the borough. The surplus generating power would supply the additional load required to furnish electrical current to the Boroughs of Hatfield and Chalfont, as well as to the expectant patrons, at this time, along the new lines running to said boroughs. Fifty kilowatts are sufficient to supply the new lines in question.

Some changes or additions will be necessary to obtain from the generating plant the proper transmission and distribution of the current needed under the increased load to properly supply the two boroughs aforesaid. The plant now distributed its power in part at 2,200 volts and a change in some lines to 6,600 volts is contemplated. The necessary transformers were purchased and paid for, but have not been installed. Additional wire lines, along the poles, will be required. This wire was purchased but, as we understand, has not been fully paid.

16. No part of the Hatfield Borough extension is constructed. Lansdale intends to use its existing line to Orvilla and then build a new line from that point to Hatfield Borough. The old line from Souderton is to be removed and will be used to make the extension from Orvilla to Hatfield Borough. The needed wire was purchased by Lansdale, but this bill, to the extent of \$915, has not been paid.

The transformers, we understand, were paid, but it will cost, in addition, to improve the line to Orvilla, about \$1,661. This does not include the cost of some material and labor in removing the old Souderton line to make the connection between Orvilla and the Borough of Hatfield.

17. The construction of the line to Chalfont will cost about \$9,671. The work and material used, so far as the line is built, cost \$5,500. There is on hand paid material, to be used in further construction, amounting to \$3,328, so that the sum of \$843 must be raised by Lansdale to complete the line.

18. If plaintiff's contention prevails and the Chalfont line must be removed, Lansdale Borough will lose the cost of the labor ex-

pended in construction and it will also cost \$1,500 to reclaim the material and remove it to Lansdale, or a total loss of over \$4,000. There will be no loss to the borough, of any material character, if it is restrained from building the contemplated line to Hatfield Borough.

19. The assessed value of property in Lansale, subject to taxation for borough purposes, is \$1,991,430. The amount of debt that may be contracted, without a vote of the electors, therefore, amounts to \$39,828.60. By the auditors' report the net indebtedness of the borough, on January 1, 1918, was found to be \$31,564.87. The answer admits that the present indebtedness is approximately \$35,000. This leaves a very small margin for an increase of debt. If the proposed constructions do not exceed the estimates they will, nevertheless, consume the greater part of this margin, but improvements, in these expensive times, usually far exceed the estimates submitted.

From the evidence before us, we can not find, with any certainty, that the execution of the contracts aforesaid will result in an increased indebtedness, in excess of the limitation binding upon borough officers.

20. To engage in generating, furnishing and distributing electricity is a hazardous business. This results from the rule of law, that any "one using such a dangerous agent is bound not only to know of the extent of the danger, but to use the very highest degree of care practicable to avoid injury to every one who may be lawfully in proximity to its wires and liable to come, accidentally or otherwise, in contact with them."

Borough councilmen serve without pay and are usually employed in looking after their own business affairs; and they can not give the time or attention that is demanded in the supervision of such a dangerous enterprise. They are necessarily dependent upon employees to whom they can not give the required oversight. A single act of negligence, carelessness or inattention, on the part of such employees, might bring serious loss to the tax payers of the borough.

DISCUSSION.

What powers does Section 41 of Chapter VI, Article XVII, of the General Borough Act of 1915 confer upon boroughs? It reads:

"Boroughs owning or operating electric light plants may make contracts for supplying electricity, for commercial purposes, outside the limits of such borough, with the consent of the municipal and township authorities, at rates not less than those established from time to time, within the limits of such borough. Nothing in this section shall conflict with the corporate rights of any corporation empowered to supply electricity in territory adjacent to such boroughs, or with the rights of other boroughs."

If this section of the General Borough Act of 1915 gives to a borough the authority of a public service corporation with the added powers to carry on its business over an unlimited section of the Commonwealth, then it constitutes a very drastic effort on the part of the legislature to extend the powers of a borough. If Lansdale Borough may run its electric poles and service to Chalfont, seven miles away, then it may, under the same power, serve Doylestown, Quakertown, or any other borough within the state. The electric current can be transmitted to distant localities if proper precautions are used to prevent waste. A borough may, therefore, become one of the largest business establishments in the state engaged in the generation, sale and distribution of electricity.

Boroughs are not chartered to conduct business enterprises. One so hazardous as the manufacture and sale of electricity would, if extensively operated by a borough, be pretty sure to bring disaster to the property owners of the municipality. A single serious accident might result in damages ruinous to the tax payers. Such business functions constitute no part of a borough government, and it follows that borough officers could not and would not give them the attention absolutely required to promote their success or to guard their safety.

The contention, that Lansdale Borough is invested with these extraordinary powers, under Section 41 of the General Borough Act, is sufficient to deny such interpretation to the act, unless the language of the section makes it imperative.

Municipal powers must be granted by express words, or they must be necessarily or fairly implied in or incident to the powers expressly granted, or they must be essential to the declared objects and purposes of the corporation, not simply convenient but

indispensable. A fair reasonable doubt as to the existence of a power must be resolved by the courts, against the municipality. *Lesley v. Kite*, 192 Pa. 274.

The courts in construing the powers of municipal corporations

“Incline to adopt a strict rather than a liberal construction, thus applying, substantially, the same rule which is applied to charters of private corporations.” * * *

“Any ambiguity or doubt arising out of the terms used by the legislature must be resolved in favor of the public.” *McQuillin on Municipal Ordinances*, Sec. 48.

This rule of construction is the more imperative where the municipality attempts to exercise the alleged power beyond its territorial limits. Without express legislative authority conferred upon a municipality, it may not exercise any powers beyond its boudaries. *Gilchrist's Appeal*, 109 Pa. 600; *Stauffer v. East Stroudsburg*, 215 Pa. 143.

It is also well established, that a municipality in furnishing water or any other commodity acts as a private corporation. *Jolly v. Monaca Borough*, 216 Pa. 345. It follows, that the powers conferred by statute upon boroughs must be determined under the rules of interpretation applied to grants given to private corporations.

Effect can be given to Section 41 of the General Borough Act without yielding to it the unlimited scope claimed by the Borough of Lansdale.

A borough, as the section declares, may “supply electricity, for commercial purposes, outside the limits of such borough, with the consent of the municipal and township authorities.” The consent of “*the municipal and township authorities*” must be obtained.

This language, to our mind, indicates that the words, “outside the limits of the borough,” refer to the municipalities and townships adjacent to said borough. This view is confirmed by the provision that the borough can not interfere with the rights of other corporations, in territory adjacent to such borough. Why deny to the borough the right to interfere in adjacent territory and give to it unlimited and unrestricted powers beyond such adjacent territory?

We are aware that the Act of June 10, 1885, P. L. 81, used similar words in giving boroughs the right to supply water, in territory outside the borough limits, but the word "adjacent" does not occur in the proviso, nor is there any consent required from the outside municipality. This right to supply water outside the borough limits was incorporated into the General Borough Act, in words very similar to those found in the Act of 1885. Water is not conveyed as easily as the electric current may be transmitted, where long distances are involved. There may, therefore, be less likelihood that a borough will engage in an extensive mercantile water business. The words in Section 41, "adjacent" and "consent of municipalities," must have been introduced with some purpose.

It is also unreasonable to suppose that the legislature intended to invest boroughs with the authority to engage in the electric light business, over unlimited territory, without any state supervision, and without many of the restrictions, expenses and burdens that are imposed on chartered corporations supplying electricity.

Corporations could not well compete with boroughs enjoying such privileges and immunities.

Towns often outgrow their incorporated boundaries. Residences beyond the territorial limits of a borough may constitute a part of the settlement or town, just as must so as the homes immediately within the artificial boundary lines. If denied electrical accommodations from the borough the occupants may suffer serious inconveniences. This, apparently, is the class of subjects that Section 41, aforesaid, intended to serve. If we give to it the construction, that boroughs may supply electricity in adjacent territory, outside of their limits, we give effect to the statutory enactment, without carrying the power to unreasonable limits, and we also avoid offending against the rule, that an alleged power in a municipality that rests upon doubt can not exist.

If we are correct, then the inquiry arises, whether the boroughs of Hatfield and Chalfont constitute territory adjacent to the Borough of Lansdale.

As Chalfont, seven miles away, is separated from Lansdale by two townships and by a county line which separates said townships, it is difficult to see how the most liberal definition of the

word "adjacent" would allow us to hold that Chalfont is adjacent to Lansdale.

Adjacent means lying near, close or contiguous. Territory adjacent to the borough does not necessarily mean territory in contact with the borough boundary line. The meaning of the word is largely governed by the subject matter in connection with which it is used. The power to annex to a borough lots, out lots or other tracts adjacent to the borough means tracts adjoining or contiguous to the borough. *Camp Hill Borough*, 142 Pa. 517. The right of a railroad company to take timber from lands adjacent to its roadway was held to extend a long distance, depending upon the facility of hauling the timber to the place of its intended use. The meaning of the word must be determined by the object sought to be accomplished by the provision in which it is used. *Chicago Railroad v. Chicago Institute*, 87 N. E. Rep. 933.

If we are correct in holding that the purpose of the grant in giving permission to supply electricity outside of the borough limits, was to accommodate the surrounding residents, factories and establishments, then it may be that Lansdale, if the section is otherwise valid, could supply electricity in the surrounding townships or parts thereof, although the lands of the consumers did not actually touch the Lansdale Borough line. We shall not attempt further upon this point. Our Supreme Court declared, in *Bly v. White Deer Water Co.*, 197 Pa. 90, that "Lewisburg Borough, in Union County, was adjacent to Kelly Township, but not adjacent to White Deer Township, the former township lying between the latter township and Lewisburg." The decision involved the question as to the extent of power given by the words "Supplying water to White Deer Township and residents adjacent thereto." This statement, in the opinion, is direct and unqualified that the two municipalities are not adjacent because a township intervened.

Hatfield Township is located between Lansdale and Hatfield Borough, and the distance between the two boroughs is two and one-half miles. One is, therefore, not adjacent to the other. The claim that Chalfont and Lansdale are adjacent is clearly without any support.

If we are in error and Section 41 of the General Borough Act gives Lansdale unlimited authority to supply electricity to outside

municipalities, then the further question arises, whether the act which attempts to confer such extravagant power is constitutional.

The title to the General Borough Act of 1915 is very brief. It reads:

“An act providing a system of government for boroughs and revising, amending and consolidating the law relating to boroughs.”

Section 41 of Chapter VI is not an amendment of the Act of May 20, 1891, P. L. 90, because that act is specifically repealed by the said General Borough Act. The title gives no notice of any kind whatever, that boroughs are empowered to engage in a business, outside of their boundaries, which may involve their taxpayers in serious loss. Prior to the said Act of 1891, there was no authority in a borough to establish a plant for generating electricity for commercial purposes for its own inhabitants, and with the repeal of the said act, even this power was eliminated.

The Constitution declares, “that no bill shall be passed containing more than one subject which shall be clearly expressed in its title.”

As already shown a borough may not furnish public service outside of its boundaries, without express statutory authority. The need for notice in the title of an act expressing such purpose is, therefore, the more imperative. If a separate act had been passed to confer such power, it would have been necessary to clearly express the subject matter in the title. This was done in the said Act of 1885, P. L. 81, giving boroughs the right to supply water outside of its territorial limits. The same is true of the Act of 1891, P. L. 90, giving boroughs the right to supply electricity to the inhabitants of the municipality. If, under the name of a general act, the requirement, as to title, can be evaded, then it is a simple matter to violate this constitutional provision with impunity.

Granting the right to a borough to manufacture electricity and to sell it outside of the limits of the borough, as a private corporation, and without any limitation as to distance, is not a subject clearly expressed by the words, “providing a system of government for boroughs.” The power relates to a subject affecting outside municipalities, as well as the inhabitants within the borough. Nor is it “revising or consolidating the laws relating to boroughs.”

There were no such laws relating to boroughs and hence none to revise or to consolidate. It was not an amending of any borough law, because the only act relating to the sale of electricity was repealed, and that act related to sales within the borough.

Even if Section 41 must be regarded as a supplement or amendment of the Act of 1891, P. L. 90, still the question arises, was the conferred power to sell electricity outside the borough germane to the original act? There is no citation of the title of the said Act of 1891, nor is the date of its approval named. The test whether a supplement or amendment is germane to the original act is found in the answer, whether the amendment would be valid if it had been included in the original act. *Mt. Joy Borough v. Lancaster Turnpike*, 182 Pa. 581. The title of the original Act of 1891 expressly limits the manufacture of electricity, for the use of the inhabitants of the borough. Under this title a provision in the original act authorizing boroughs to engage in the manufacture of electricity, for sale outside of the borough, could not have been sustained.

We come then to the inquiry, whether a title in these general words, "providing a system of government for boroughs, and revising, amending and consolidating the law relating to boroughs," throws open wide the door under such title alone for the enactment of sections pertaining to subjects which hitherto were not regarded as falling within the sphere of borough government, and when such subjects relate to business dealings by the borough with outside municipalities and outside residents. If a borough, under such general title, may be empowered to carry on an electrical mercantile business with her people and with the municipalities in eastern Pennsylvania, why may it not be authorized under the same title, to conduct a hotel business, for the benefit of the inhabitants of the borough and for the accommodation of strangers and travelers, or to engage in the wholesale grocery business, for the accommodation of the retail merchants in the borough and those doing business throughout the State?

It is contended that the title of the said Act of 1815 is like that used by the General Borough Act of April 3, 1851, P. L. 320. The words of the title in the latter act are: "An act regulating boroughs." In *Sugar Notch Borough*, 192 Pa. 349, the court said: "Nothing more general and comprehensive, on the subject, could

have been devised. It included the entire range of borough affairs, so far as they were within legislative control." But the title, "providing a system of government for boroughs," is not so broad as that used in the Act of 1851. When we speak of a "System of government for boroughs," the title suggests government, laws or rules relating to the affairs of boroughs in connection with their people and their property.

What connection has a system of government for boroughs with a provision in the act relating to a mercantile business between a borough and outside municipalities? If there is no such connection then the title is not sufficient to support so radical a change in the law, as Section 41 contemplates. *Sewickley Borough v. Sholes*, 118 Pa. 165. The title in an act must suggest its own meaning and can not by any definition in the body of the legislation be extended to include what its own words do not imply. *Mansfield Case*, 22 Pa. Superior Ct. 230.

Again, there is nothing in the title to attract the attention of outside boroughs, or of outside municipalities or outside residents, that they were interested or affected by the proposed legislation. Corporations chartered to furnish electricity were effected without any intimations that their rights were involved in establishing a system of government for boroughs.

It is said that under Section 41, municipalities can not be invaded without their consent, but citizens of these municipalities may not have been willing to run the risk of having their interests subjected to such consent. A minority might aid in the defeat of the act, but become helpless, after the law is enacted. An electrical corporation, it is argued, is protected by the proviso, that the right conferred upon the boroughs and municipalities shall not conflict with the rights of such corporations. But the boroughs become competitors in the electrical business, and the corporations may be compelled to resort to expensive litigation to protect their rights. They should have notice of the proposed legislation which intends to impose such burdens. The taxpayers of *Lansdale Borough* should have notice of the proposed legislation, before their properties are subjected to the hazards of outside business ventures by the borough authorities.

In the legislation for boroughs, parties to be affected, outside of the boroughs, must have notice, in the title of the act, that their

interests are involved. *Road in Phoenixville*, 109 Pa. 44; *Quinn v. Cumberland County*, 162 Pa. 55. The title must be so clear that it gives notice of the legislative intent and purpose to those specially interested therein. *Mt. Joy v. Lancaster Turnpike Co.*, 182 Pa. 581; *Lycoming Fair Assn. v. Lycoming County*, 65 Pa. Superior Ct. 307. If the title of the bill apparently affects certain localities while the body of the act in some provisions affects other localities, the act is unconstitutional. *Payne v. School Dist.*, 168 Pa. 391.

True, "the restrictions of the Constitution, upon legislation, apply to direct legislation, not to the incidental operations of statutes constitutional in themselves upon other subjects than those with which they directly deal." *Sugar Notch Borough*, 192 Pa. 356. But the legislation, in Section 41, is direct between the borough and outside municipalities and not merely incidental to them.

An act relating to the grading of Troy Hill, in the City of Allegheny, is not sufficient, in title, to support a provision in the act that the expenses of the said grading shall be assessed on all property benefited in said city and in Reserve Township, because the property owners of Reserve Township are without notice, in the title, that their interests are affected or may be involved. *Beckert v. City of Allegheny*, 85 Pa. 191.

The object of the constitutional requirement is "that legislators and others interested shall receive direct notice, in immediate connection with the act itself, of its subject, so that they may know or be put upon inquiry as to its provisions and their effect. *Commonwealth v. Samuels*, 163 Pa. 283.

It is contended that the index of chapters, under the act, supplements the title, as to the provisions contained in the act. All that Chapter VI, under the head of Articles XVII contains is, "Public Service." What information or suggestion can any one find in these words, as to the contents of Section 41, providing for an electrical business to be carried on by boroughs with outside municipalities?

The title under the Constitution must speak and nothing else can take its place. "Suggestions or inferences which may be drawn from knowledge dehors the language used are not sufficient. "The Constitution requires that the notice shall be con-

tained in the title." *Phoenixville Road*, 109 Pa. 44; *Phila. v. Ridge Avenue Railway*, 142 Pa. 484; *Commonwealth v. Samuels*, 163 Pa. 283.

It is also claimed that Lansdale Borough does not propose to supply, in the execution of her written contracts, more than her present surplus electrical current. It is contended that she can fill her obligations without exhausting this surplus. If she has the capacity to supply her numerous lines now operated in the surrounding townships, and still has a sufficient supply for the new enterprises, she must have constructed her original plant far beyond her needs. But Section 41 does not limit the power of boroughs to sell their surplus current. They may, if the said section extends their power to unlimited outside territory, and if it is constitutional, enlarge their plants to meet the most extravagant undertakings.

But the constitutionality of an act must be determined by the power it confers and not by the limited exercise of that power.

The question may also arise, whether the contracts made by the Borough of Lansdale are not improvident even if the borough may lawfully supply electric current to the two boroughs in question. There is no provision for relief under the contracts, even if the demand for electricity, before their terms expire, should exceed the capacity of the borough's plant. Expensive alterations, additions and improvements may be required, and these may be too costly for the borough to provide. Many conditions may arise whereby the borough may not be able to supply the limited current now required under the contracts. If a breakdown or inability continues, for more than forty-eight hours, a penalty of five dollars per day is imposed, unless the inability arises from certain specified causes. The contracts should at least be safeguarded so that the borough may not incur serious losses.

These contracts require more than the furnishing of electrical current. Supplies, fixtures, wire and wiring, lights, transformers, and various other appliances must be furnished and put in place. That this is a material part of the business conducted by the borough is shown in its annual statement. Supplies to the amount of about \$9,000 were sold or furnished, at a profit of over \$1,700.

"The fact that a city is authorized to maintain water works does not allow it to embark in the plumbing business or selling supplies and materials to private citizens and doing contract work in placing the same upon the premises." Dillon on Municipal Corporations, Vol. 3, Sec. 1292.

The objection to the exercise of such a business by a municipality was considered in *South Pasadena v. Pasadena L. & W. Company*, 152 Cal. 579. The court said:

"It may be doubted whether a municipality could be authorized to enter into the general business of supplying water or light to other municipalities and to persons outside its limits, when such power is to be made the foundation for an independent commercial or business enterprise having no relation to its own supply of water or light. A grant of power for such a purpose would, in effect, be a permit to the municipality to engage in an independent commercial enterprise, an example of municipal trading pure and simple."

Under the action and contention of the Borough of Lansdale, Section 41 sets no limit to any business enterprise in furnishing electric current or supplies, that the borough may undertake.

The Borough of Lansdale expended about \$3,000 in wages, hauling and freight in the construction of the Chalfont line, and it will cost about \$1,500 to reclaim the material used, if returned to Lansdale.

It is contended that the plaintiff was guilty of laches, and that a loss of more than \$4,000 will follow if his bill is sustained,

The representatives of the borough are presumed to know the law and any notice that the plaintiff might have given to them could not have furnished any added light or knowledge to that already possessed by the borough. The misapplication of the funds of a borough for improvements beyond its territorial limits can not be justified upon the ground that no complaint was made before or at the time the unlawful payments or expenses were incurred. There is no proof that the plaintiff had any knowledge of the acts done by the borough. Silence, without knowledge, does not estop. *Logan v. Gardner*, 136 Pa. 600. The plaintiff tax-

payer was on the stand, but was not questioned upon his knowledge as to the time the work was done. It was done outside of the borough and, therefore, it cannot be said to have occurred in his presence.

The doctrine of equitable estoppel has no application where usurped powers contravening public policy, have been exercised by a municipality. *Schumm v. Seymour*, 24 N. J. E. 154.

We are not convinced that the words for "Commercial purpose" limit the supply of electric current to homes, and office buildings. They include the sale and purchase of electricity for street lighting for private homes and for power uses. A system of accounting adopted by electric companies can not control the well recognized meaning of the words.

We shall not sustain the contention that the contracts are void, because they confer exclusive rights for a term of years. The question is not free from doubt, but it is not necessary to pass upon the same under our findings and conclusions reached upon the other points.

No corporation empowered to supply electricity is before us, alleging that the actions of the borough of Lansdale are in conflict with the rights of such corporation. Even if the plaintiff can raise this question the facts before us are not sufficient to pass upon this inquiry.

Under the foregoing discussion, the following conclusions of law are entered.

CONCLUSIONS OF LAW.

1. Section 41 of Chapter VI, Article XVII, of the Act of May 14, 1915, P. L. 312, does not attempt to confer upon boroughs the power to supply electricity for commercial purposes outside of the limits of boroughs, except within the municipalities adjacent to such boroughs.

2. Hatfield Borough and Chalfont Borough are not adjacent municipalities to the Borough of Lansdale, because in one case the Township of Hatfield intervenes, and in the other case two townships intervene.

3. If the said act in Section 41 attempts to confer power upon boroughs to supply electricity to outside territory not adjacent to

the boroughs, then it is unconstitutional because it offends against the requirement that "no bill, except general appropriation bills, shall be passed containing more than one subject which shall be clearly expressed in the title."

4. Whether the same defect title applies to Section 41, so far as it authorizes a borough to supply electricity in territory adjacent to the borough, we shall not decide. Just what the Borough of Lansdale proposes to do under the contracts within the surrounding and adjacent townships, beyond what it is already doing, does not clearly appear.

5. We can not set aside the contract made with the Borough of Chalfont, because that borough is not a party to the bill, but we can, on a taxpayer bill, restrain the misapplication of the public funds of the Borough of Lansdale. That a taxpayer has standing to raise this question by a bill in equity, can not be successfully disputed.

6. The contracts with the Boroughs of Hatfield and Chalfont, in their present forms, are unwise and improvident, because they contain no guaranty or protection against loss to the Borough of Lansdale. The taxpayers may be seriously damaged should such losses occur. The contracts together with the dealings in supplies form the foundation and beginnings of a mercantile business and involve the entry by the borough into independent commercial transactions. This feature brings the contracts in conflict with the policy of the law.

7. The plaintiff is entitled to an injunction restraining the Borough of Lansdale, its officers and agents from supplying or transmitting any electricity from its plant to the Borough of Hatfield or to the Borough of Chalfont or to the residents within said boroughs, defendants pay the costs.

And now, November 4, A. D. 1918, after hearing the evidence and the argument of counsel, and upon due consideration, its is ordered, adjudged and decreed, that the foregoing findings and conclusions of law be filed in the office of the prothonotary who will enter a decree nisi, in accordance with our seventh conclusion of law, and he will notify the parties or their solicitors forthwith of the said filing, and if no exceptions are entered within the time required under the equity rules, he will enter a final decree accordingly as of course.

HEIGHTS WATER COMPANY v. CITY OF LEBANON.

Injunction—Municipal corporations—Extensions of municipal water works—Annexed territory—Public service companies.

A municipality must obtain the consent of the Public Service Commission to extend its water system into annexed territory which is already being served by a public service company—Article III, Section 3 (d), of the Public Service Company Law, 1913, P. L. 1374. A court of equity will enjoin a municipality from making such an extension without the consent of the Commission being first had and obtained, and a preliminary injunction will be continued at the instance of a public service company until the Commission grants its approval.

In the Court of Common Pleas of Lebanon County. Sitting in Equity. 1918 Equity Docket No. 2. Motion to continue preliminary injunction.

S. P. Light, for plaintiff.

W. G. Light, City Solicitor, *W. C. Graeff* and *L. Saylor Zimmerman*, for defendant.

HENRY, P. J., June 28, 1918:

This case is now before the court upon a motion to continue the preliminary injunction granted by this court, restraining the City of Lebanon from laying water pipes or mains and furnishing and supplying water to the public of "The Heights," formerly in South Lebanon Township, now a part of the City of Lebanon.

The Heights Water Company, the plaintiff, was incorporated in 1902 for the purpose of supplying water for domestic and other purposes to the inhabitants of South Lebanon Township, including The Heights, which was wholly within said township, in the County of Lebanon, and State of Pennsylvania, and to such persons, partnerships and associations residing therein as may desire the same, and since about the time of its incorporation has been supplying water to the residents of the said district, known as The Heights.

The City of Lebanon is a municipal corporation, being a city of the third class, situate in the said County of Lebanon, and under its corporate powers is possessed of and operates a water plant and furnishes water to the inhabitants of the said city. In 1912

a portion of South Lebanon Township, including the said district known as The Heights, was annexed to the City of Lebanon, and the said city, pursuant to ordinance duly enacted, has awarded contracts for the extension of its water plant and water mains to the said portions of South Lebanon Township lately annexed to the city, and upon which the plaintiff has located its pipes and water mains and is furnishing water to the residents thereof. The water pipes for the said proposed work have been on the ground for several weeks and about one thousand feet of pipe have been laid and connected with a fire plug and also with the water system of the city. The City of Lebanon has not secured the approval of the Public Service Commission of the State of Pennsylvania for the extension of its water system by the laying of the said pipes and mains and supplying water to the inhabitants of the district known as The Heights.

Paragraph 43, Art. V, Sec. 3, of the Act of June 27, 1913, P. L. 568, 589, provides that every city of the third class is authorized and empowered to enact ordinances, among others, for the following purposes: "To have the exclusive right, at all times, to supply the city with water, and such persons, partnerships and corporations therein, as may desire the same, at such prices as may be agreed upon; and for that purpose to have, at all times, the unrestricted right subject to the provisions of existing laws, to make, erect, and maintain all proper works, machinery, buildings, cisterns, reservoirs, pipes, conduits, for the raising, reception, conveyances, and distribution of water."

The Act of July 26, 1913, P. L. 1374, Art. III, Sec. 3, subdivision (d), provides: "That upon approval of the Public Service Commission first had and obtained and upon compliance with existing laws, and not otherwise, it shall be lawful 'for any municipal corporation to acquire, construct or begin to operate any plant, equipment or other facilities for the rendering of furnishing to the public of any service of the kind or character already being rendered or furnished by any public service company within the municipality; provided, however, that nothing herein contained shall interfere with or affect the right or power of a municipal corporation to continue the operation of its municipal plant or to extend the same within the territory of such municipal corporation, or any part thereof, then being supplied by the public service

company rendering or furnishing service of a like kind or character.' The latter portion of Sec. 18, of Art. V, of the same act, provides that 'when application shall be made to the Commission by any municipal corporation for the approval required by the provisions of Art. III, Sec. 3 (d), of this act, such approval, in each and every such case, or kind of application, shall be given only if and when said Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience, or safety of the public.'"

The primary question here for decision, as determining the continuance of the preliminary injunction, is whether a city of the third class can, without the approval of the Public Service Commission, extend its water system to recently annexed territory in which the water company has been furnishing water to the public prior to the annexation and continues such service.

Whatever doubt may have existed as to the general effect upon municipalities of the Public Service Company Law and the right of any one affected thereby to raise, in equity, the question of violation of or noncompliance with the provisions of this law, has been dispelled by the recent case of Bethlehem City Water Co. v. Bethlehem Boro., 253 Pa. 333, wherein it was held that before a borough can lawfully extend its water mains through a locality which is being supplied by a water company, the borough must secure the approval of the Public Service Commission and that equity will restrain such extension of its water mains without such approval. It is urged that this case is not authority for the proposition that a city of the third class must first secure the approval of the Commission before extending its water system and service to territory in which an incorporated water company is already serving the public; that the exclusive and unrestricted right to supply water to the city and to persons, partnerships and corporations therein, as given by the Act of June 27, 1913, cannot be limited by the general words of the Public Service Company act. While the right granted to boroughs to supply water to the public is not set forth as being of an exclusive character, yet we fail to see how or why this language should relieve cities of the third class from the operation of the Public Service Company act, which is clearly designed to reach all public utilities, municipal and otherwise. The words "exclusive right" must receive a reasonable

construction—they mean the exclusive right when the city establishes a water system of its own, with the right to acquire such systems as may be in operation in the municipal territory. It could hardly be contended that upon the annexation by the city of territory in which an incorporated company is furnishing water to the public, that the corporation thereupon loses its corporate rights and must stop supplying water to such annexed territory. The clause of the act under construction provides that the right shall be “unrestricted” and “subject to the provisions of existing laws,” and we take it that this means not laws in existence at the passage of the act, but laws in existence at the time of the exercise of that right; and at this time subject to the provisions of the public utilities act. It is strongly contended, however, that both of said acts, having been passed at the same session of the legislature, must, if possible, receive such construction as will give validity and effect to both and that the exclusive and unrestricted right given in the act governing third class cities is repugnant to that part of the Public Service Company Law which requires municipalities to obtain the approval of the Commission before extending their water mains into territory occupied by some other public service company. The proposition of law as suggested is undoubtedly correct, and, if possible, effect must be given to both of these acts; but interpreting these acts as meaning that a city of the third class is given exclusive and unrestricted right to furnish water when once secured, under existing laws, with the obligation to secure the approval of the Public Service Commission where the city desires to extend its water system to territory in which a water company was operating prior to the annexation of the territory to the city, is giving validity and effect to both of these enactments. To say that a city of the third class could, without the approval of the Public Service Commission, extend its mains into territory occupied by an incorporated water company, would to that extent nullify that portion of the Public Service Act which requires the approval of the Commission in all cases where the same kind or character of service is already being furnished by a public service company.

On the present showing the court would not be warranted in saying that the plaintiff was guilty of laches. It had a right to assume that the city would secure proper legal authority before

extending its mains and the evidence does not very clearly indicate when the preparations were made, or when the laying of pipes on the ground was actually begun.

Complaints and dissatisfaction as to service and the cost of water to the consumer, are matters for the Public Service Commission and not for this court.

The want of water for fire protection in this part of the city might have been a controlling factor in disposing of this case, but counsel for the city stated at bar, at the conclusion of the argument, that the city did not wish to have the right to continue the proposed extension of its water system if limited in its use to fire protection.

The resident of The Heights should not lightly denied those privileges and conveniences which they have a right to expect and enjoy through annexation to the city, nor should the rights of the city in acquired territory be curtailed, but in the acquisition and enjoyment of those rights and privileges the law of the State must be followed. The courts cannot change or abridge the law.

And now, to wit, June 28, 1918, the preliminary injunction heretofore granted in this case is hereby continued until final hearing, without prejudice to the right of the defendant to move to dissolve the injunction upon securing the approval of the contemplated extension by the Public Service Commission of the State of Pennsylvania.

CITY OF SCRANTON *v.* SCRANTON RAILWAY CO.

Rates—Street railway companies—Contract with municipal corporation—Power of courts to determine reasonableness of rates in first instance—Jurisdiction of court and Commission.

The reasonableness of rates charged by a public service company in violation of a contract with a municipality will not be reviewed by the courts in the first instance. The Public Service Commission has exclusive original jurisdiction in such cases.

Motion to dismiss bill. In the Court of Common Pleas of Lackawanna County. No. 9, May Term, 1918. In Equity.

R. S. Houck, for plaintiff.

H. B. Gill, Knapp, O'Malley, Hill & Harris and O'Brien & Kelley, for defendant.

EDWARDS, P. J., November 15, 1918:

This case came on to be heard on bill and answer and from the pleadings, admissions of counsel and the arguments, we find the following facts:

1. The City of Scranton granted its consent to the Valley Passenger Railway Company by certain ordinances and resolutions for the construction in certain of its streets in said ordinances and resolutions enumerated of street railway tracks upon the conditions set out therein.

2. A number of tracks were constructed by the Valley Passenger Railway Company and the Scranton Railway Company, with which the Valley Passenger Railway Company was merged and consolidated in 1896.

3. Among the conditions under which said tracks were constructed were that the lines of the railway should be constructed within the period of two years. In two of the ordinances it is provided that the right of the company thereunder should cease and determine at the expiration of that period with respect to the streets where no tracks had been constructed. The other ordinances make no provision as to what shall occur if no tracks are built or only built in part.

4. That the rate of fare should not exceed five cents.

5. Neither the Scranton Railway Company nor the Valley Passenger Railway Company have constructed tracks upon all the streets enumerated in any of the ordinances or resolutions with one exception, and since March 21 of the present year the Scranton Railway Company has been charging upon its said lines of railway, including those built under the ordinances and resolutions in question, a fare in excess of five cents.

6. The matter of the validity of the franchise of the Valley Passenger Railway Company has been taken out of the case by the defendant filing a release of all the unused portions of the streets covered by its franchise, and this release was produced in court upon the argument of the case and delivered to the city solicitor of the plaintiff.

7. It also appears that a proceeding is now pending before the Public Service Commission of Pennsylvania to determine the question of the right of the defendant to charge a fare in excess of five cents.

8. Plaintiff contends that the charge of this excess fare constituted a breach of the conditions of the ordinances and resolutions granting the aforesaid franchises and entitles the city to have the same canceled and the tracks of the defendant removed from the streets. The defendant claims that the court is without jurisdiction with respect to this matter and that the Public Service Commission is the tribunal which, in the first instance, is entitled to determine the question of excess fares, and that this bill should be dismissed, and in the thirtieth paragraph of its answer sets forth that until the question of fares has been determined by the Public Service Commission this court is without jurisdiction to grant the relief asked for by the complainant. In addition to the facts set forth in the thirtieth paragraph of the answer it has filed the following motion to dismiss the bill:

"Now, November 12, 1918, all questions raised by the bill, answer and replication in this case having been mutually arranged, excepting the question depending upon the right of the defendant to collect fares greater than five cents per fare in the City of Scranton, which question it was agreed in court is now pending before the Public Service Commission of Pennsylvania upon tariffs duly filed, and as to which rates complaint has been filed by the plaintiff in this case, the defendant respectfully moves that the bill in this case be dismissed for the reason that the Court of Common Pleas of Lackawanna County is without jurisdiction to pass upon the question until the same has first been passed upon and decided by the Public Service Commission of Pennsylvania."

So the only question now involved before this court is that of jurisdiction, namely, the right to entertain the bill while the matter involved is still before the Public Service Commission.

DISCUSSION.

The plaintiff contends that the Public Service Commission has no jurisdiction in this case because of the clause contained in the ordinance limiting the right of the defendant to charge a fare of

five cents; that this clause made a binding and lasting contract with respect to the rates to be charged by the defendant and that they cannot be altered by the Public Service Commission, and that it is our duty to pass upon this question before the Public Service Commission acts upon the question of rates. We cannot agree with these contentions.

The Act of 1913 creating the Public Service Commission gives them much the same power as the Interstate Commerce Commission under the act of congress, and they may pass upon these questions subject to review by the courts, and we do not now think it our duty nor would it be right for us to pass upon the jurisdiction of the Public Service Commission in a case actually before it, and our view is in accord with the practice approved by our Supreme Court.

Mr. Justice MOSCHZISER in *St. Clair Boro., Appel., v. Tamaqua and P. E. Ry. Co.*, 259 Pa. St. 462, (6 P. C. R. 33), on page 466, says: "As before stated, the court below did not attempt to adjudge as to the binding force of the alleged contract here in question, i. e., the ordinance of 1906, but evidently based its decision upon our ruling in the *Bellevue Borough* case, to the effect that questions of rates be charged by public service corporations must be passed upon in the first instance by the Public Service Commission, before any aspect of the matter involved can be brought before the courts for determination; and in this we see no error." And matters within the jurisdiction of the Public Service Commission must first be determined in every instance by it before the courts will adjudge any phase of the controversy. *Klein-Logan Company v. Duquesne Light Co.*, 261 Pa. 526, *Advance Reports* Oct. 18, 1918.

We have, however, quite carefully considered these questions as raised by the plaintiff and do not hesitate to say in passing that any determination we might have made with respect thereto would not change our view as to the decree we shall make in this case.

The only other matter for discussion is defendant's motion to dismiss for lack of jurisdiction. We deem the decisions of our courts very clear and explicit that since the Act of 1913, independent of all questions of merit, the Court of Common Pleas has no jurisdiction to enforce contracts in relation to rates of fare, but that any complaint concerning the reasonableness and justice

thereof must first be made to and determined by the Public Service Commission. As Justice ELKIN said in *Bellevue Borough, Appellant, v. The Ohio Valley Water Company*, 245 Pa. St. 114, "This is not because the courts have any desire to avoid the performance of duties cast upon them by the law, but because the people speaking through the legislature have declared that these duties shall be performed by a special tribunal created for that purpose. The disposition everywhere is to commit questions relating to the regulation and the rates of public service corporations to the supervisory powers of special tribunals, and concededly matters of this character are within the domain of legislative action." And the court says in *St. Clair Borough, Appel., v. Tamaqua and P. E. Ry. Co.*, *supra*, "In the *Bellevue Borough* case, we decided two points of law: (1) That 'hereafter, so long as the Act of 1913 (*supra*) remains in force, the question of the reasonableness of rates established by public service corporations must in the first instance be submitted to the Public Service Commission, when challenged,' and we there said, 'This is now the declared statutory policy of the law, and it is binding not only upon the interested parties, but upon the courts as well.'" This principle has been followed in *Callender I. Leiper v. The Baltimore & Philadelphia Railroad Co., et al.*, opinion by Justice Fox filed Oct. 17, 1918. Also, "A bill in equity to enjoin an electric company from terminating or attempting to terminate a contract alleged to have been renewed by the plaintiff under the terms of a previously existing contract with defendant, requiring defendant to furnish electricity to plaintiff at certain specified rates, was properly dismissed, on the ground that the question was properly one for the Public Service Commission in the first instance." *Klein-Logan Company v. Duquesne Light Co.*, 261 Pa. 526, *Advance Reports* Oct. 18, 1918.

We deem it unnecessary to cite other cases as to this proposition nor does this question need further discussion, for we are clearly of the opinion that we have no jurisdiction in this case.

CONCLUSION OF LAW.

The only conclusion of law which can be reached in this case is that the defendant's motion to dismiss for lack of jurisdiction must be sustained and a decree be entered accordingly.

COMMONWEALTH OF PENNSYLVANIA v. THE PUBLIC LEDGER
COMPANY.

Loans tax—Loans for current indebtedness not exempt from taxation.

In the Court of Common Pleas of Dauphin County. No. 20, Commonwealth Docket, 1916. Appeal from settlement of loans tax.

Francis Shunk Brown, Attorney General, for the Commonwealth.

Olmsted, Snyder and Miller, for defendant.

KUNKLE, P. J.:

This is an appeal from the settlement of an account against the defendant company for the loans tax for the year 1914. It is submitted for trial without a jury. The facts are not in dispute.

The settlement was made on November 11, 1915, upon an indebtedness of \$347,286.00 on which the defendant was charged with a tax, less the treasurer's commission, of \$1,335.23. The indebtedness consisted of one-sixth of a mortgage amounting to \$147,286.35, and four notes each for the sum of \$50,000, amounting in all to \$200,000.00. One of the notes was outstanding ten and one-half months; another ten months; another nine and one-half months, and another nine months. They were issued and the money realized thereon was used for the purpose of paying the defendant company's current indebtedness.

The sole question presented is whether the notes were subject to the tax on loans. It is objected that they were not taxable because they represented the company's current indebtedness, and our attention is called to *Commonwealth v. Manor Gas Coal Company*, 5 Dauphin Report 81, in support of the objection. We are unable to find anything in the taxing statutes which discriminates between loans so far as regards the purposes for which they are created, or that warrants relief from taxation of corporate obligations representing money borrowed for current indebtedness or expenses. There are exemptions in the statutes but this is not one of them. The tax is on the indebtedness or on the obligation

in the hands of the holder and there could be no sound reason for making the liability for the tax depend on the purpose for which the loan was created or the use to which the borrowing corporation might choose to put it. That would be no concern either of the Commonwealth or of the creditor who is primarily liable for the tax.

It is admitted by counsel for the Commonwealth that if the notes are taxable, they are not taxable for the whole year as charged in the account, but only for the number of months they were outstanding.

We are of the opinion that the notes were not exempt from the tax for the objection stated. A computation of the tax for the time they were outstanding, less the treasurer's commission, with interest from January 11, 1916, and including the attorney general's commission may be prepared and when presented, we will direct judgment to be entered in favor of the Commonwealth and against the defendant for the amount which shall appear to be due.

COUNTY COURT OPINIONS.

COMMONWEALTH OF PENNSYLVANIA *v.* WABASH-PITTSBURGH TERMINAL RAILWAY CO.

Loans tax—Certificate of indebtedness issued by receiver.

Certificates of indebtedness issued by a receiver pursuant to authority conferred upon him by order of the court, are taxable as the indebtedness of the corporation as provided in Section 17 of the Act of June 17, 1913, P. L. 507.

In the Court of Common Pleas of Dauphin County. No. 92 Commonwealth Docket, 1916. Appeal from settlement of loans tax.

KUNKLE, P. J.:

This case has been submitted to the court for trial without a jury. The facts are as follows:

FACTS.

During the year 1914 covered by the present settlement, the defendant company was in the hands of a receiver, who by the authority of the court appointing him, created for the defendant's purposes the indebtedness evidenced by the certificates upon which the tax here claimed was imposed. In the account which was settled August 9, 1916, the defendant was charged with a tax, less the commission for collection, of \$741.00 on the nominal or par value of certificates of \$195,000. From this settlement the defendant appealed.

DISCUSSION.

The only objection to the account is that the certificates are not of the class of obligations the tax upon which is required to be assessed and collected through the corporation. Certificates of corporate indebtedness are made taxable by Section 17, of the Act of June 17, 1913, P. L. 507, and the tax thereon is directed to be collected as theretofore, Section 18, that is by the corporation. The point of the objection is that the certificates were not issued by the corporation and do not represent its indebtedness, and that consequently the tax was collectable through the local authorities. We cannot accept this view. The certificate was issued by the receiver not for himself but for the company. The moneys raised thereby and received by him were for the use of the company and were actually used in the conduct of its affairs. The certificates are therefore the obligations of the company as much so as would be loans made by and evidenced by certificates issued by the officers of the company while under their management and control. They are expressly made a lien on the company's property. On their face the receiver disclaims all individual liability upon them. They do not represent his indebtedness. If not the company's indebtedness nor the receiver's, whose indebtedness do they represent? It is idle to pursue the matter further.

CONCLUSION.

We are of the opinion that the indebtedness is the company's and that the certificates, having been issued by its authorized representative for its corporate purposes, were issued by the company within the meaning of the taxing statutes.

Accordingly, the Commonwealth is entitled to recover as follows:

Tax, less commission for collection,	\$741.00
Interest from Oct. 2, 1916,	88.92
Attorney General's commission, 3%,	41.49
Total,	<u>\$871.41</u>

for which sum judgment is directed to be entered in favor of the Commonwealth and against the defendant company unless exceptions be filed within the time limited by law.

PUBLIC SERVICE COMMISSION.

JAMES McPHILOMY AND LIDA McPHILOMY, TRADING AS FRANKLIN COAL MINING COMPANY, LIMITED, *v.* THE PENNSYLVANIA RAILROAD COMPANY.

Railroads—Reparation—Siding—Refusal to deliver cars.

The unjust, unreasonable, and discriminatory refusal of the respondent to deliver cars upon the siding of the claimant for wagon loading entitled the latter to reparation; but the failure of the respondent to construct a siding to the new mine of the complainant, resulting from the inability of the parties to arrive at mutually satisfactory terms, does not constitute a valid claim for reparation.

COMPLAINT DOCKET No. 1852.

Report and Order of the Commission.

A. M. Liveright and *J. A. Gleason*, for complainants.

Henry Wolf Bikle and *S. B. Lloyd*, for respondent.

AINY, Chairman:

The complainants in this proceeding have for some years been engaged in the business of mining and shipping coal at Brisbin, in Clearfield County, their mine, known as Sterling No. 2, being located on the Goss Run branch of the respondent company's railroad. Prior to 1914 this mine had been regularly operated and at that time practically all the coal had been removed from the seam which was open. After the mine had lain idle for a considerable period of time the complainants, being desirous of renew-

ing their operation, requested the respondent to place cars for loading by wagon, the tipples having become so out of repair that it could not be used.

The proceeding now before the Commission is upon a petition for reparation, the complainants alleging that the unjust, unreasonable and discriminatory practices of the respondent with relation to the installation of the siding and placing of cars thereon have damaged them to an amount in excess of \$30,000.00. Before the testimony in the proceeding was concluded, the amount of this claim was reduced to about \$18,000.00. This claim is made up of several items which will be considered separately.

When the complainants were about to renew their mining operations they took up with the respondent the question of repairing the sidetrack so that cars could be placed for loading, and after a great many interviews and considerable correspondence, the railroad company quoted the complainants a figure for repairing the track and a check for this sum was forwarded to the respondent company. This was done on January 4, 1916, and on the 14th of that month the complainant was notified that no more cars could be placed for wagon loading and the check was returned. This refusal of the railroad company to permit the loading of cars by wagon is the basis for the first part of the complainants' claim for reparation.

The rule with relation to wagon loading became effective on January 17th and continued in effect until February 25th, and we are of opinion and find and determine from the testimony that the practice of the railroad company in enforcing this rule was unjust, unreasonable and discriminatory, and that the complainant is entitled to damages because of such unjust, unreasonable and discriminatory practice. The complainant contends that it would have been entitled to receive one car per day, basing its contention upon the theory that it should have been rated as a developing mine. From the testimony we are unable to agree with this contention, and find and determine that the complainant would have been entitled during the period in question to receive only ten cars for loading, and that the damages actually sustained by the complainant on account of the above mentioned unjust, unreasonable and discriminatory practice, is \$500.00.

The complainant also asks for damages due to the delay in developing a new seam of coal, alleging that the failure to deliver

the cars above mentioned retarded the opening of a new mine. We are of the opinion and find and determine that the delay in opening the new mine, if there was any, was not in any way due to the action of the respondent company, and the claim for reparation on this branch of the case is refused.

The main portion of the complainants' claim for reparation, amounting to almost \$18,000.00, is made up of damages alleged to have been suffered because the railroad company did not install and operate a switch for handling cars to be loaded from the above mentioned new mine. From the testimony we are of the opinion that the negotiations between the parties were in the beginning designed to secure the repair of the existing sidetrack for the loading of the small tonnage, which remained in the vein that was opened. These negotiations covered a long period, and it is apparent that when it became clear that the complainants desired a sidetrack, on which a number of cars were to be placed, the estimates for its construction were greatly in excess of those which were first quoted. Disputes arose between the parties as to the methods of constructing this new sidetrack and as to the payment for the work, and the delay in construction was due as much to the refusal of the complainants to enter into an agreement as to the insistence of the respondent upon a particular type of construction. At one time the respondent insisted upon a siding constructed with a run-around and of a type which was the generally accepted standard for new construction to large operations. We see nothing unjust or unreasonable in this requirement and the fact that at a later date the respondent modified its demands does not warrant the imposition of damages. At all times the respondent was willing to construct a siding upon the payment of the cost by the complainants and at no time did the complainants show a like willingness to pay the cost or give security therefor. From the testimony we are entirely unable to say that the failure to construct the siding was in any way due to an unjust, unreasonable or discriminatory practice on the part of the respondent, and we therefore find and determine that the complainant is entitled to no damages upon this portion of its claim for reparation.

An order will therefore be issued directing the Pennsylvania Railroad Company to pay to the complainant the sum of \$500, being the damages actually sustained by said complainant in conse-

quence of the unjust, unreasonable and unlawful practices above mentioned.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having under date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, December 16, 1918, the Pennsylvania Railroad Company is *ordered and directed* within thirty days from the date hereof to pay to James McPhilomy and Lida McPhilomy, partners trading as the Franklin Coal Mining Company, Limited, the sum of \$500, being the damages actually sustained by said complainants in consequence of the unjust, unreasonable and unlawful practices mentioned in said report.

By the Commission,

WM. D. B. AINEY, *Chairman.*

WILLIAM B. HORTON v. SHENANGO VALLEY ELECTRIC LIGHT COMPANY.

Electric light companies — Service — Refusal to make extensions into new territory.

A public utility company, enjoying an exclusive franchise, may not choose to serve only sections of its territory which are immediately remunerative. Reasonable extensions, determined from the facts in each case, may be ordered.

The cost of necessary extension must be borne by the company and may not be exacted from the prospective patrons.

COMPLAIN DOCKET No. 2377.

Report and Order of the Commission.

B. J. Jarrett, for the complaiant.

Ralph J. Baker, for the respondent.

RILLING, Commissioner :

The complainant, William B. Horton, is owner of premises and resides at No. 1208 Washington street, in the Borough of Farrell, Mercer County, Pennsylvania. The respondent, the Shenango Valley Electric Light Company, exclusively serves said borough. Respondent solicited the service of complainant who signed an application therefor. It was, however, not furnished.

Complainant has a new frame dwelling house of five rooms and bath, which he first occupied November 20, 1917. It is situate in one of the new and growing sections of Farrell which, on account of the great mills operated there, is rapidly increasing in population. The American Sheet and Tin Plate Company is now constructing one hundred new houses a short distance beyond the residence of complainant, which is the third house and 110 feet from Stambaugh avenue, upon which street respondent has a line and is rendering service. There are at least nine new houses in the immediate vicinity of complainant's residence, and three more being constructed. Others will soon be located there. All of which will require service of respondent.

Respondent contends that its line on Stambaugh avenue, 110 feet from complainant's residence, is not of such character that it can supply complainant therefrom. In order to render proper service to him and others in the vicinity it made a proposition, whereby it proposed to make the necessary extension, the total cost of which, at present high prices, would be \$417. This sum complainant and seven others in his immediate neighborhood would be required to pay to the respondent. Of this amount \$253.00 would be returned to those who advanced the same by refunding to them twenty per cent. of the amount of the bills paid by them; the difference between \$417 and \$253 refunded to be retained by respondents. New patrons in this locality requiring service from such extension would be supplied without any contribution toward the cost of such extension; the statement being made by respondent's representative that the parties paying the difference between \$417 and \$253 might collect such portion thereof as they saw fit from any new patrons of respondent.

The position of respondent cannot be better stated than by quoting the testimony of its superintendent, Mr. Kemmery; page 17.

"Q. Your proposition to Mr. Freeble was in accordance with the general practice of the company as well as its allied concerns, and was that you would (render) the service provided the people to receive the service as a group would pay the company \$417, the then estimated cost of the extension line without the meters?

"A. Correct.

"Q. And you furthermore agreed if that were done you would refund to this group \$253 out of the \$417 by allowing them 20 per cent. of their bills for service?

"A. Correct.

"Q. And that the balance of the \$417 represented the excess cost of this installation based on the difference between prices of July, 1914, and prices of the date of the estimate?

"A. Correct.

"Q. That was your agreement or tender of agreement, as the terms of getting the installation?

"A. Yes, sir.

"Q. Mr. Horton wasn't actually asked to pay \$417? That was the price to the whole group?

"A. Yes, sir.

"Q. And they were to get back \$253?

"A. Yes, sir, that is correct.

"Q. State whether or not that proposition in its essentials is the standard practice of this company?

"A. Absolutely."

* * * * *

Page 27.

"Q. Suppose this proposal of the company were accepted and you furnished the light, and the next week somebody else would want light, under what conditions would you serve them,

"A. Serve them from the line without any expense to them provided we were not required to increase our facilities to serve them."

The respondent has the sole right to serve Farrell Borough. In the construction and operation of its plant it is required to provide for all of the service reasonably demanded of it in the district for which it is chartered. It cannot choose and serve only the sections immediately remunerative. Whenever required so to do, it should, at its own cost and expense, make all reasonable needed extensions. The law does not contemplate that the patron provide the capital to make reasonable additions or extensions.

What is or is not a reasonable extension can only be determined from the facts in each particular case. On account of existing conditions an unprofitable extension may, in some instances, be required. The location, future prospects and all other conditions must be considered. There is, however, no contention in the case that the extension asked will be unprofitable. The necessity therefor is admitted.

The high prices prevailing, as well as the scarcity of labor and the difficulty in securing capital, does not alone constitute a sufficient ground to determine a proposed extension to be unreasonable. The abnormal conditions now existing should be given due consideration in compelling any particular extension to be made at this time, but under no circumstances do we think that the burdens thereby imposed should all be passed over and placed upon the shoulders of the partons, as respondent seeks to do in this case. Under the undisputed evidence, the conclusion of the Commission is that the extension needed to serve the complainant is a reasonable one and should be promptly made by respondent at its own cost. The amount of capital required is not large. An order requiring the extension to be made will be issued accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, December 10, 1918, It is ordered: That the respondent, the Shenango Valley Electric Light Company, at its own cost, make the extension to its line and facilities necessary to provide the service applied for, within thirty days from the date of service of this order.

By the Commission,
WM. D. B. AINEY, *Chairman.*

WILLIAM B. IRWIN, ET AL., v. CONESTOGA TRACTION CO.

Traction companies—Rates—Increase of—Alleged to be excessive.

Rates which produce only sufficient revenue to pay the annual depreciation and a fair return are not excessive.

COMPLAINT DOCKET NOS. 2265 AND 2284.

Report and Order of the Commission.

E. Spencer Miller and *J. E. Senft*, for complainants.

John E. Malone and *S. R. Zimmerman*, for respondent.

RILLING, Commissioner:

The respondent, the Conestoga Traction Company, operates a street railway system in the City of Lancaster, Pennsylvania, with ten interurban lines extending into surrounding territory. The system is operated on a zone basis. The Lancaster City zone includes the entire city and one mile beyond. By a schedule of rates filed effective August 2, 1918, it increased its regular zone fares from five to six cents. Increases were also made on return trip and commutation rates.

The complaints in the above cases are directed against these increases, particularly those on its interurban line between Lancaster and Coatesville and in the City of Lancaster. Complaint is also made that in Lancaster the increase violates the provisions of certain franchise ordinances granted to some of respondent's constituent companies. In so far as this part of the complaint is concerned, it will be sufficient to state that this Commission has, in its report in *Wilksburg v. Pittsburgh Railways Company*, P. U. R. 1918 F, page 131, held that rate regulating franchise conditions do not preclude it from exercising the supervising powers delegated to it by the provisions of the Public Service Company Law. This branch of the complaint may, therefore, be dismissed.

As to the reasonableness of the increased rates complained of, respondent assumed the burden of proof. It appears that the increase was made to meet in part respondent's increased operating cost resulting from war conditions. Respondent owns and operates all lines in the City of Lancaster and some of the interurban

lines radiating therefrom. Other interurban lines are operated by it under long term leases, by the provisions of which it agrees to and does pay certain rentals by paying dividends on the outstanding stock of such companies. The respondent is authorized by law to so lease and operate lines of other companies. In so doing it succeeds to their rights and assumes their charter obligations. It should render the service due to the public and has a right to receive a fair return permitted on its property used and useful. We can, therefore, in determining the reasonableness of the rates complained of, do so on the basis that it owns and operates the entire system. The testimony was adduced on that theory. The entire system has about 164 miles of single track, of which approximately twenty miles are in the City of Lancaster. The company purchases the power needed to operate its road, the price paid therefor varying, depending upon the amount required.

The average interurban rates per mile of respondent under the increased rates are as follows:

Single fares, 2.4c per mile.
Round-trip, 1.86c per mile.
Monthly tickets, 1.6c per mile.

So far as the complaint against the interurban service of respondent between Lancaster and Coatesville, a distance of thirty miles, is concerned, no evidence of any kind was given indicating the cost of the service nor the extent of investment of the line over which the service is rendered.

The Pennsylvania Railroad Company operates five local trains each way between these points. Its rates are lower than those of respondent for regular return and commutation tickets. Between Coatesville and Parkesburg, however, a distance of six miles, and over which complainant frequently rides, the rates of respondent are 12 cents, which are lower than those of the railroad company. Respondent operates a regular hourly service between Lancaster and Coatesville with special cars on the half-hour at stated periods.

Increase in the cost of labor was shown as follows:

1918

January 1	2c per hour
May 1	3c per hour
August 1	3c per hour
September 1	3c to 5c per hour
September 16	4c per hour

making a total increase for one year of \$262,000.

For the year ending July 31, 1918, it was shown that there was an increase of \$14,775.42 in the cost of necessary materials purchased by respondent, above the cost of the same for the preceding year. It was further shown that since July 31, 1918, there were further increases so that the total estimated increase in the cost of materials required by respondent for the year commencing August 1, 1918, will be \$22,163.13.

The item of increased taxes for the coming year was estimated at not less than \$25,000. The testimony relating to this increase lacked the definite character which was given in support of the other increases. Based on these amounts there will be a total increased of operating cost for respondent for the year commencing August 1, 1918, of \$309,163.13.

During the month of August, 1918, being the first month during which the increased rates were in effect, and which it was stated was one of the best traffic months in the year, there was an increase in respondent's gross revenue of 12.8 per cent., which, if continued during the year, would result in a total additional revenue of \$140,631.82. The increase is less than one-half of the increase of operating expenses shown.

During the year ending July 31, 1918, the company had a gross income of \$1,295,486.54, with a total operating expense of \$843,429.99, which included certain items for maintenance but nothing for depreciation. By applying to these figures the increase in operating cost and revenue, the following is a statement of the estimated earnings and revenue for the year, commencing August 1, 1918:

Gross earnings for the year ended July 31, 1918,	\$1,295,486	54
Estimated increase in earnings for year ending July 31, 1919,	140,631	82
Estimated gross earnings for year ending July 31, 1919,	\$1,436,118	36
Total expenses for year ended July 31, 1918, ...	\$843,428	99
Estimated increase in expenses for year ending July 31, 1919,	309,163	13
Estimated expenses for year ending July 31, 1919,	\$1,152,592	12
Estimated net earnings for year ending July 31, 1919,	\$283,526	24

The following is a capitalization statement of respondent company:

	<i>par value</i>	
6% preferred stock,	\$200,000	
Common stock,	3,999,950	
Total stock,		\$4,199,950
4% bonds of Conestoga Traction Company,	\$1,277,500	
5% bonds subsidiary companies, ..	610,000	
Total bonds,		\$1,887,500
Total capitalization,		\$6,087,450

Whether the proceeds of all of its capital stock and bonds were used in the acquiring or construction of its system was not definitely shown. Its bonds and preferred stock are worth par. The value of its common stock was not shown.

Prior to 1913 no dividends were paid on the common stock of the Conestoga company. It did, however, pay interest on its bonds and six per cent. on its preferred stock, as well as the rentals or dividends on its leased lines. The foregoing gross operating expense did not include any of such payments.

Since 1913 dividends have been paid on the common stock of the Conestoga Traction Company as follows:

- 1913—One-half of one per cent.
- 1914—One and one-half per cent.
- 1915—One and one-half per cent.
- 1916—Two per cent.
- 1917—Three and one-half per cent.

From the foregoing statements it would appear that respondent will receive, under the increased rates, an annual net revenue to be applied for depreciation and fair return for the year ending August 1, 1919, the sum of \$283,526.24. We should bear in mind that out of this sum, it is obligated to pay as rental or dividends on its leased lines the sum of \$189,257.

Under these facts, is respondent justified in making the increase in its rates which are complained of? The answer to this inquiry is to be found in ascertaining whether \$283,526.24, annual net revenue, is sufficient to allow a proper sum for depreciation and pay a fair return upon the used and useful property needed in the rendering of its service to the public.

No valuation of respondent's property was shown. The amount of its capital stock and outstanding bonds and the number of miles of track, to wit, 164, is practically all the evidence indicating value. The Commission will not attempt to make any determination as to the fair value of respondent's used and useful property. It deems it unnecessary so to do. The making of a detailed valuation would impose a burden upon respondent that is not required to meet the exigencies in this case. It is a matter of almost common knowledge that a street railway system, such as respondent's, may have a value per mile of track of any sum from \$20,000 upwards. If we use the figures of \$30,000 per mile, respondent's system would have a value of approximately \$5,000,000. We do not say it is of this value. It may be more or less. What we intend to say is that if we use the evidence we have, with our knowledge of street railway values, we can reach a conclusion as to whether or not the sum of \$283,526.24, respondent's annual net revenue as ascertained above, for the year ending August 1, 1919, will be sufficient for depreciation and a fair return upon its property.

It is the duty of respondent at all times to so maintain its system that it can render to the public adequate service. Therefore, the company should be required to set aside annually an adequate sum for depreciation. In the case of *Knoxville v. Knoxville Water Company*, 212 U. S. 380, the Supreme Court of the United States held:

"It is entitled to see that from earnings the value of the property invested is kept unimpaired so that at the end of any given term of years the original investment remains as it was at the beginning. It is not only the right of the company to make such a provision but it is its duty to its bond and stockholders, and in the case of a public service corporation at least its plain duty to the public."

From all the evidence, the Commission has reached the conclusion that the increased rates of respondent are not unreasonable. If in the future there should be any material reduction in operating cost or if respondent should receive increased revenues, it should adjust its rates in conformity with its obligation to the public. If it fails to do so the Commission, on having its attention directed thereto, will make such adjustment as the public needs demand. The complaint will be dismissed.

ORDER.

These matters being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, January 7, 1919, It is ordered: That the complainants in these cases be and the same hereby are dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

UNITED LUMBER COMPANY, ET AL., v. URSINA & NORTH FORK
RAILWAY CO.

Rates—On lumber—Alleged to be excessive.

The respondent filed a tariff fixing a rate of 45 cents per ton for certain classes of lumber. The complainants attacked this rate on the ground that a contract between the parties provided for a rate of 20 cents per ton. The Commission postponed decision in the matter until certain disputed features pending before the county and the Interstate Commerce Commission were decided. In the meantime, the complainants adopted a new method of billing their shipments, and the respondent thereupon imposed a rate under an interstate tariff of \$1.20 per ton. To this new rate a second complaint was made. Both complaints were heard and disposed of together.

At the hearing the first complaint was withdrawn. The second (No. 2382), subject to an adjustment of accounts agreed to by parties, was sustained by the Commission.

COMPLAINT DOCKET NOS. 405 AND 2382.

Report and Order of the Commission.

George D. Howell, for complainants

Uhl & Ealy, for respondent.

BY THE COMMISSION:

The complaint as originally filed (C. 405) related to rates on shipments on certain classes of lumber like coke and car slats, mine props, etc. The rate attacked approximated forty-five cents per ton, and, as filed, superseded a contract upon which complainants relied, entered into between the complainants and respondent, carrying a rate of twenty cents per ton for the same service. The pendency of certain features of the controversy in the Court of Common Pleas of Somerset County, and later in the appellate courts of the State and before the Interstate Commerce Commission, involving questions of inviolability of contracts and whether the shipments under these rates were intrastate or interstate, led the Commission to postpone its decision. These matters, so far as the Interstate Commerce Commission and the courts are concerned, now being out of the way, the complainants, at the hearing before the Public Service Commission in Pittsburgh on De-

ember 6, 1918, intimated their willingness that complaint in No. 405 be dismissed and the rate as filed, to wit, forty-five cents, be left to stand.

It appeared that complainants, subsequently to the filing of the first complaint (C. 405), and possibly for the purpose of bringing their shipments under intrastate as against interstate jurisdiction, adopted a new method of billing. In so doing, however, they were met with a rate which the respondent imposed under an interstate tariff of \$1.20 per ton. This led to the filing of a second complaint (No. 2382), and it, by action of the Commission, for the purpose of hearing, was merged with the earlier complaint and heard with it at Pittsburgh on December 6, 1918.

After conference with counsel and representatives of complainants and respondent, it appearing to the Commission equitable and just so to do, the Commission finds and determines that the \$1.20 rate does not properly apply to complainant's shipments, and that the charge of that amount, in so far as the same exceed the forty-five cent rate which the Commission finds to be the applicable rate on the movements in issue, was unjust and unreasonable, and to that extent the complaint in No. 2382 should be sustained.

In the light of this conclusion to which the parties, complainants and respondent, were consenting, and as a basis for payment of outstanding bills for shipment and order of reparation, counsel for complainants and respondent entered into and filed with the Commission the following stipulation which is made a part of the Commission's order:

"In consideration of the foregoing termination of these two proceedings the receivers of the United Lumber Company will account to the Ursina & North Fork Railway Company for the shipments recited in Complaint C. 2382 at the forty-five cent rate and will be allowed credit for all payments heretofore made thereon at five dollars a car, and on the balance the railway company shall be allowed three per cent. average interest; the entire amount to be paid by complainants upon presentation of satisfactory bill and within ten days. All other unsettled freight charges are to be promptly paid by complainants on the basis of the forty-five cent rate less any credits paid on account and with three per cent. average interest thereon."

Now, to wit, December 16, 1918, *It is ordered:* That Complaint No. 405 be dismissed; that Complaint No. 2382 be sustained, and that the agreement for the adjustment of outstanding accounts hereinbefore set forth be approved.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF CURWENSVILLE MOTOR TRANSIT CO.

Autobusses—Conflicting rights of protestant.

It appearing that the operation of an autobus line between Clearfield and Curwensville is necessary for the accommodation and convenience of the public, and that the protestant company, although possessing the right and consequent obligation to furnish the service, did not adequately render the same, the application was approved, subject to the limitation that the applicant company neither solicit nor transport local passengers within the borough limits of Clearfield.

APPLICATION DOCKET No. 2105—1918.

Report and Order of the Commission.

Howard B. Hartswick, for applicant.

A. H. Woodward, for protestant.

AINEY, Chairman:

The application in this case is a copartnership and seeks approval of the right to transport persons and property by means of autos or autobusses between the Boroughs of Clearfield and Curwensville.

The Fullington Autobus Company protests on the ground that the granting of such right would be an infringement upon its corporate rights and privileges.

It appears from the evidence presented that an autobus line between the Boroughs of Clearfield and Curwensville is necessary for the accommodation and convenience of the public and that the protestant company, although possessing the corporate right and consequent obligation to furnish the service, did not ade-

quately serve the public between the Boroughs of Clearfield and Curwensville. We are of the opinion that this application should be approved with the limitation that the applicant company shall not solicit or transport local passengers within the borough limits of Clearfield, and an order will therefore issue, directing that a Certificate of Public Convenience issue in accordance with this determination.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition and protest on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, January 7, 1919, It is ordered: That a Certificate of Public Convenience shall issue evidencing the Commission's approval of the beginning of the exercise of the right by E. R. Edwards, J. W. Edwards, and H. S. Cassler, trading as the Curwensville Motor Transit Company, to operate one (1) White Motor Company autobus, Maker's No. 43969, having a seating capacity for sixteen (16), for the transportation of persons or property between the Boroughs of Clearfield and Curwensville, in Clearfield County, Pennsylvania, upon the following route: Beginning at the intersection of Second and Market streets, in the Borough of Clearfield; thence south on South Second street and Old Town road to public highway; thence by public highway through the village of Hyde, in Lawrence Township; thence continuing by public highway through Lawrence Township and Pike Township into State street in the Borough of Curwensville, to intersection of Thompson and State streets in said Borough of Curwensville; subject to the following conditions:

First: That the said applicant company shall not solicit or transport local passengers within the limits of the Borough of Clearfield.

Second: That the said applicant company shall comply with all the provisions of the Public Service Company Law as now existing, or as may hereafter be amended, and the special rules hereto attached and made a part hereof, governing the operation of autobus lines as at present prescribed by the Commission, or as may hereafter be adopted by it.

By the Commission,
WM. D. B. AINEY, *Chairman.*

HENDERSON COAL CO. *v.* AMERICAN EXPRESS CO., AND AMERICAN
RAILWAY EXPRESS CO.

Express companies—Service—Alleged to be discriminatory.

It is not discriminatory for an express company to refuse to receive large sums of money for transmission on the following day when it appears that the complainant has other means of accomplishing the same object, and that the facilities of the respondent are adequate for all reasonable demands. This is so notwithstanding the fact that the respondent may receive money for shipment on the following day at other places.

COMPLAINT DOCKET No. 2355.

Report and Order of the Commission.

W. B. Stewart, for complainant

Branch P. Kerfoot, for respondents.

BY THE COMMISSION:

The complaint in this proceeding is made by the Henderson Coal Company against the American Express Company and the American Railway Express Company, and alleges that the practice of those companies in refusing to receive currency at Pittsburgh for shipment to Hendersonville, on the day following the offering of it, is unjust, unreasonable and discriminatory. From the testimony it appears that the complainant is a coal mining company, with its principal office in the City of Pittsburgh and its works at Hendersonville, about thirty miles from Pittsburgh,

near the Montour Railroad. The company pays the men at its mines semi-monthly and has been accustomed to shipping the money for its pay roll by express, delivering the currency to the express company in Pittsburgh during the afternoon of the day before it is required at Hendersonville. The money was taken out of Pittsburgh on a train which left at 6:20 a. m., and delivered to the agent of the complainant at Hendersonville station. In May, 1918, the express company notified the complainant that it would no longer receive the currency on the day before the same was to be delivered at Hendersonville, and it is against this practice that the complaint is made.

The express company insists that it does not have proper facilities at its office in Pittsburgh for the safeguarding of the large amounts of money which would be delivered to it for transportation on trains leaving on the day following the delivery and that its duty consists in furnishing only such facilities as are reasonably adequate. It contends that the safeguarding of sums such as are here involved at this office of the company cannot reasonably be demanded of it, especially in view of its offer to receive the money early in the morning of the day on which it is to be transported, and it is testified that the complainant can make arrangements with the banks to have the money furnished before banking hours on that day. It would seem that the money could then be carried to Hendersonville on a train which leaves Pittsburgh at 7:30 a. m., and arrive at Hendersonville about 10 o'clock.

In view of the circumstances surrounding this particular shipment of money, we are of the opinion that the practice of the express companies complained of is not unjust, unreasonable or discriminatory. The facilities offered at any station must depend upon the reasonable requirements there, and the fact that the express company, at other stations, receives money for shipment on the following day does not show an undue discrimination in practices. The complaint will therefore be dismissed, and an order to that effect will accordingly issue.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on

file, and having been duly heard and submitted, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof :

Now, to wit, January 21, 1919, It is ordered: That the complaint in this case be, and the same hereby is, dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

NEAL J. FERRY, ET AL., *v.* LEHIGH TRACTION CO.

Traction companies—Rates—Increase of—Alleged to be excessive.

The respondent increased its rates from five to six cents per zone. The complaints alleged that the latter was excessive. The Commission found that the new rates produced only sufficient revenue to pay a fair return on the value of the used and useful property of the respondent after paying operating expenses and making provision for depreciation. The complaints were thereupon dismissed.

COMPLAINT DOCKET NOS. 1594, 1595 AND 1596.

Report and Order of the Commission.

Roger J. Dever, for complainants.

George R. Bedford, for respondent.

AINEY, *Chairman:*

Each of these complaints is against proposed increase of fares on the respondent's railway. The respondent was incorporated November 7, 1892, and owns and operates a system of trolley lines within the City of Hazleton, and radiating therefrom in several directions to Milnesville, Lattimer, Freeland, McAdoo, Jeansville, West Hazleton, Hazle Park, and perhaps other places. It operates in all 17.58 miles of track. Subsequently to its incorporation, it acquired certain real estate, known as Hazle Park, for the purpose of developing its railway traffic.

The respondent leased from the Wilkes-Barre and Hazleton Railway Company and uses on its system certain cars and equipment, the original cost of which the Commission ascertained, and as will appear in the evidence, was \$46,652.34, and it also leases from the same company a sub-station and car barn, the original cost of which was \$56,784.92.

From 1894 to July 22, 1917, it had maintained a uniform rate of fare (5c) for each fare zone. In June, 1917, it filed with this Commission a new tariff to become effective July 22, 1917, which tariff was duly posted and published as required by law, increasing its zone rates to six cents.

These three complaints, presented before the effective date, allege the increased rate to be unjust and unreasonable, and the respondent assumed the burden of proof at the hearings, and presented at the first session a detailed statement of original costs and a valuation upon the reproduction new, less depreciation basis. The complainants' cross examination of respondent's expert and other witnesses was directed almost wholly to organization features and to stock and bond issues. They offered no evidence in rebuttal and proposed to rest their case without any testimony. This the Commission declined to permit without having an adequate check on the valuation and expense figures submitted by respondent. Later hearings were fixed, but complainants and their counsel were not present and did not participate.

The Commission directed its own experts to examine the valuation data which had been submitted by respondent, and to audit the latter's books, and to inquire into the cost of power which the respondent purchased from the Wilkes-Barre and Hazleton Railway Company, an affiliating street railway organization. The Commission offered the results of that examination in evidence, and its experts were placed upon the witness stand, examined and cross-examined.

The capital stock of the company was shown to be \$1,000,000. Upon it no dividend had even been paid. The so-called fixed charges consist of \$500,000 first mortgage bonds, \$60,000 Hazle Park bonds, and \$140,000 certificates of indebtedness. None of these items are important for our present consideration for they are not factors entering into the determination of a rate base.

From the testimony adduced it appears that the respondent's plant was built by Alvan Markle, contractor, and at the conclusion of his work he turned over to the company his books and itemized account showing his actual outlay in building the railway property, which, after an audit by the company, were, according to major subdivisions, organization expenses, engineering and supervision, right of way, cars, electrical line construction, etc., carried to the books of the company as the original cost. These items aggregated \$751,550.47, which is the basic figure in determining the original cost of respondent's plant. This figure has fluctuated from year to year as capital expenses were incurred or power house or other property was disposed of, until, in June, 1917, the amount as carried upon the company's books, verified and checked by the Commission's experts, was \$742,164.68, subdivided as follows:

Superintendence,	\$721 96
Right of way,	15,716 21
Cars,	59,084 60
Electrical equipment of cars,	44,439 81
Electrical line construction,	80,235 20
Furniture and fixtures,	255 37
Buildings and fixtures,	51,835 22
Track and roadway,	334,964 55
Other lands, etc.,	38,779 20
Shop equipment,	960 55
Miscellaneous equipment,	8,437 80
Miscellaneous,	153 15
Telephone,	996 18
Investment real estate,	44,688 20
Sundry fixtures,	110 00
Hazle Park,	60,786 68
	<hr/>
	\$742,164 68

In support of its right to an increased rate of fare, the respondent offered in evidence a valuation based upon the reproduction new theory, as follows:

Rights of way,	\$100,000 00
Track and roadway,	1,016,955 41
Electric line construction,	134,751 04
Real estate used in operation,	55,000 00
Buildings and fixtures,	60,000 00
Real estate—investment,	66,000 00
Shop tools and machinery, .....	.....
Cars,	219,500 00
Electric equipment of cars, .....	.....
Miscellaneous equipment,	13,150 00
Miscellaneous, .....	.....
Furniture and fixtures,	5,000 00
Telephone line,	9,093 80
Engineering and superintendence, .....	.....
Hazle Park,	73,200 00
Sundry fixtures, .....	.....
	<hr/>
	\$1,752,650 25

From this total there should be deducted \$375,000.00, included for bridge construction, and 10%, or \$137,765.00 for depreciation, and from which we deduce that the reproduction new value, less depreciation, June 1, 1917, was \$1,239,885.00, which sum represents the costs of the physical items of the property without allowance for going concern, or for any of the items usually included for less tangible elements. In fact such allowances are not included in connection with the original cost figures.

For the purposes of determining a rate base predicted upon the used and useful property which the respondent operates in its public service, we included the costs of leased cars and equipment, \$46,652.34, and the leased sub-station and car barn, \$56,784.92.

It would appear therefore that the fair value of respondent's property devoted to public service is not less than the original cost with these leased items included, to wit, \$845,601.94, nor probably in excess of \$1,239,885.00, the reproduction new value as depreciated.

The estimated annual operating expenses of this company, based upon the actual experience of the respondent for six months, ending June 30, 1918, as shown by the books of company, and carefully checked by our own accountants, is \$197,737.32, to which should be added a reserve for depreciation to keep the property in good condition for public service, \$25,935.18.

If we fix a fair return on capital invested at 7% and apply it to the smaller of these two valuation figures, to wit, \$845,601.94, the amount would be \$59,192.14, making a total revenue which respondent would be entitled to receive on that basis, \$283,864.64.

The six cent rate has been in effect since June 22, 1917, and we therefore have a basis for computation from actual earnings for the year 1918, and find same to be \$282,358.50, or not more than sufficient to meet the company's operating obligations and provide for a proper reserve fund and pay a 7% return.

For further comparison it may be stated that the operating expenses for the year 1917 were \$196,680.62, adding a reserve for annual depreciation (the proper amount), \$26,035.29, and allowing 7% for fair return on \$845,601.94, \$59,192.14.

The gross revenue which the company was entitled to receive for that year was \$281,908.05.

It actually did receive on the five cent rate of fare from January 1, 1917, to June 22, 1917, and on the six cent fare from the latter date to December 30, 1918, \$256,190.24.

Under this showing the Commission finds that the fair value of respondent's property used and useful, devoted to public service upon which it is entitled to receive a fair return, is not less than \$845,601.94. It follows, therefrom, that the six cent rate of fare under attack is not unjust and unreasonable. Therefore the complaints should be dismissed. Orders should be issued accordingly.

ORDER.

These matters being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, January 21, 1919, It is ordered: That the complaints in these cases be and the same hereby are dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

CITY OF PITTSBURGH *v.* PITTSBURGH RAILWAYS CO.

Railway companies—Service—Inadequate and unreasonable.

Pending the report of the chief engineer of the Commission, all cars except summer cars, were ordered put in a proper state of repair.

See 6 P. C. R. 1 and 227.

COMPLAINT DOCKET NO. 1571.

Report and Order of the Commission.

John C. Bane, Andrew W. Robertson and George C. Bradshaw,
for receivers Pittsburgh Railways Co.

Chas. K. Robinson and George N. Munro, for City of Pittsburgh.

William J. Brennan, for employees of Pittsburgh Street Railways Co.

BY THE COMMISSION:

During the severe weather conditions existing one year ago the operation of the Pittsburgh Railways Company almost reached the point of breaking down. At that time, and since, testimony was taken in the complaint of the City of Pittsburgh against that company. The Commission was convinced that the service is inadequate, unreasonable and unjust. No order was made because of the demoralized operating and financial conditions of the respondent company. Since that time the Commission has taken pains to watch the operations of the property of the company with a view to prevent a repetition of the demoralization of last winter. Some months ago the chief engineer of the Commission was directed to procure a complete report of the number, type, seating capacity and condition of all the rolling stock and the equipment thereof. On December 7, 1918, the Commission held a hearing for the purpose of putting upon the record whatever data had been obtainable and to bear a report from the managing officers of the respondent company as to the steps they had taken with reference to the winter service. Incidentally, the Commission heard a review of the activities of the engineering department in the super-

vision of the valuation and service conference and of the various proceedings in the Federal Court, since the appointment of receivers for the respondent company.

Testimony was taken from which the following facts appear:

The revenue of the company for the first seven months of the fiscal year, April 1, 1918, to November 1, 1918, yielded \$8,565,000.00. The operating expenses for the same period were \$6,427,000.00. The increase of revenue was but 3% over the same period of the preceding year, while the increase of operating expense was 15%. There was a falling off in the number of riders of 12½%. All of this is disappointing, but it is impossible, in view of the abnormal conditions existing during the war, to fix the responsibility for this loss of traffic during the period mentioned. The fare of approximately five and one-half cents was in vogue until June 23, 1918, and from the last mentioned date, for a period of more than four months, included in the calculation, the fare was five cents for persons riding exclusively within an inner district with a radius of about two miles, and seven cents for all others.

With reference to the tracks, it was testified by various operating officials that there had been more repair work during the past summer than in any previous one at the joints of rails, but there had been little track renewal; only about 1.2 miles. As to the rolling stock, it appears that the respondent has about 1,673 passenger cars of all sizes and types, of which 273 are summer cars. Of the 1,400 cars that are available for use at this time, 1,300 in the language of the superintendent, are "assigned to service." It would seem that about 100 single-truck cars have been placed in storage, but that all others have been prepared for winter usage. The schedule provides for the use of 1,003, forty-five less than the number on the tracks one year ago. With 1,400 cars available for use, and making an allowance of 12% for a reserve, or 168 cars, the company can expand its schedule to the extent of 229 cars if necessary.

While testimony has been offered from time to time indicating constant complaint from the public, charging inadequacy of service, overcrowding of cars, breakdown of equipment and other acts of neglect on the part of the management of the company, and although the chief engineer of the Commission has gathered much

data as to traffic conditions with respect to one section of the city, it is unfortunate that on the whole no data exists from which positive conclusions as to the number of cars that are necessary or the headway under which they may run on all the various lines and routes of the system. It was testified by the superintendent of the company that the determination of the number of cars and their location is a subject that he knew little about except in a very general sense; that this duty, during the whole course of his employment of the company over a period of ten years, had been assigned to a subordinate department; that it had never been considered or discussed with him by the executive officers of the company by the company's board of directors, nor during the past few months by the receivers. It appears also from the testimony, although it was not entirely undisputed, that the conditions of the cars, of the car equipment, and of large parts of the track is very low. More than one-third of the cars were purchased over fifteen years ago and are given a value by the valuation committee running from 10% to 40%, and an even larger ration of the electrical equipment is given a value of from 10% to 35%. It was testified that 45% of the track mileage should be replaced; that instead of rebuilding or providing for the rebuilding of approximately twenty-four miles of track per year there had never been more than ten miles rebuilt in any one year. From all the facts gathered about the condition of the roadbed, of the rolling stock, of the neglect of duty on the part of the responsible officers connected with the management, it would seem to the Commission that there is serious danger of a failure on the part of the management in providing service to the public and fulfilling its obligations under the law in the operation of the property during conditions of bad weather, and it seems that an order will be necessary as soon as further data can be obtained as to the flow of traffic and the car supply. Such further information will be available partly from the records of the company and partly from observations that must be made as to actual traffic conditions. The Commission at its last hearing directed the superintendent of the respondent company to file with the Commission not later than December 16th a complete statement of the number, type, seating capacity and condition of all its cars, and a copy of all its schedules. In addition to this, counsel for the complainant and respondent were

both asked to suggest to the Commission a plan for observing traffic. As soon as such information shall be obtained by the Commission the engineering bureau will complete its investigation, and the Commission will then be prepared to take further action in the premises. At this time it is considered advisable to make an order upon the respondent to immediately prepare all of its cars, except the summer cars, for use, so that when it will be found what number are needed the respondent will be prepared to perform its duty at least to the maximum of its present capacity. An order will be made accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and due investigation of the matter and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof ;

Now, to wit, December 10, 1918, the Pittsburgh Railways Company and its receivers are hereby ordered and directed to immediately prepare all of its cars, except the summer cars, for use, so as to accomplish the purposes set forth in said report.

By the Commission,

WM. D. B. AINEY, *Chairman.*

CITY OF PITTSBURGH *v.* PITTSBURGH RAILWAYS CO.*Petition for rehearing.*

COMPLAINT DOCKET NO. 1571.

Order of the Commission.

John C. Bane, Andrew W. Robertson and George C. Bradshaw,
for receivers Pittsburgh Railways Co.

Chas. K. Robinson and George N. Munro, for City of Pittsburgh.

William J. Brennan, for employees of Pittsburgh Street Railways Co.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition of the receivers of the Pittsburgh Railways Company for a rehearing on the order of the Commission, dated December 10, 1918, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had:

Now, to wit, January 14, 1919, It is ordered: That the order of this Commission, dated December 10, 1918, be and the same is hereby suspended until February 5, 1919, except as to 1,302 cars, and thereafter until further order, on the following terms and conditions:

(a) That said receivers shall on or before that date, to wit, February 8, 1919, have completed a traffic study with the means at their command consisting of their traffic records and other data in their possession:

(b) The use of the proper officials and employees in their transportation and traffic departments at the critical points of traffic during the hours of congestion to observe and record the degree of crowding of cars, of delays to passengers, of compliance with schedule time, etc.;

(c) That the receivers and the executive officers under them, in the meantime, give consideration to the flow of traffic during the hours of congestion; and

(d) That on or before February 8, 1919, by formal or informal hearing or conference, to be hereafter determined upon, the Commission be made acquainted with the opinions of the said receivers and their subordinates and the data and information learned and compiled, as hereinbefore described, all looking to a determination by the Commission, with the aid of other information obtained through the City of Pittsburgh and the Commission's own engineering force now on the ground, of an approximate answer to the question: What number of cars and seats are necessary and proper for the service, accommodation, convenience and safety of the public on the various routes of the respondent railways' system.

By the Commission,
WM. D. B. AINEY, *Chairman*.

GEORGE L. ROBERTS, ET AL., v. SOUTH WAVERLY WATER CO.

Water companies—Service—Refusal to extend mains—Service more easily obtainable from another company.

COMPLAINT DOCKET No. 1254.

Report and Order of the Commission.

Charles E. Mills, for complainants.

Frederick E. Hawkes, for respondent.

E. M. Dunham, for the Borough of Sayre.

BY THE COMMISSION:

At the time this complaint was filed, the respondent company, although possessing corporate authority to furnish service in the territory covered by the complainant, had only extended its water mains to a point about 3,000 feet distant from the land of the complainants. It obtained its supply of water from the municipal plant of the Borough of Waverly, N. Y., and for such supply was dependent upon an indefinite and uncertain contract with the said municipality. It further appears that the mains of the Sayre

Water Company are located within a short distance of the land of the complainants, but that the said Sayre Water Company did not have charter rights to furnish service thereto. The Sayre Water Company has now secured, by virtue of merger proceedings, the right to furnish service in Athens Township, including the tract of land of the complainants. We are of the opinion, from the evidence submitted, that the Sayre Water Company could with greater facility, less expense, and with more convenience to the public, furnish the service desired by the complainants, and therefore the complaint in this case should be dismissed.

Now, to wit, December 16, 1918, *It is ordered*: That the above entitled complaint be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman*.

BOROUGH OF MIDDLETOWN *v.* MIDDLETOWN & SWATARA CONSOLIDATED WATER CO.

Water companies — Penalty — Failure to comply with order of Commission.

See 6 P. C. R. 533.

COMPLAINT DOCKET No. 1813.

Report and Order of the Commission.

John R. Geyer, for complainant.

George R. Heisey, for respondent.

AINEY, Chairman:

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon a rule entered December 23, 1918, directing the respondent, the Middletown & Swatara Consolidated Water Company, to show cause why it should not forfeit and pay to the Commonwealth of Pennsylvania a fine or penalty for its neglect, failure and refusal to comply with the order of the Public Service Commission of the Commonwealth of Penn-

sylvania to it directed, dated September 23, 1918, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had:

Now, to wit, January 7, 1919, it is found by the Commission that the respondent, the Middletown & Swatara Consolidated Water Company, has failed, omitted, neglected and refused to obey, observe and comply with the final order of the Commission to it directed on September 23, 1918, for and during a period of twenty days, to wit, from December 3, 1918, to December 22, 1918, both days inclusive; and

It is ordered: That the Middletown & Swatara Consolidated Water Company shall forfeit and pay forthwith to the Commonwealth of Pennsylvania the sum of fifty (\$50.00) dollars per day for each of twenty days from December 3, 1918, to December 22, 1918, both days inclusive, amounting to the total sum of one thousand (\$1,000.00) dollars, the same being the penalty for violations of said order of the Commission of September 23, 1918, as provided by Article VI, Sections 35 and 36, of the Act of July 26, 1913, P. L. 1374, as amended by Act of June 3, 1915, P. L. 779.

By the Commission,

WM. D. B. AINEY, *Chairman*.

SUPERIOR COURT.

BEAVER VALLEY WATER COMPANY, APPELLANT, *v.* PUBLIC SERVICE COMMISSION, APPELLEE, AND ROCHESTER BLD. & LOAN ASSN., INTERVENING APPELLEE.

*Water companies—Rules and regulations—Reasonableness of—
Right of Commission to determine same—Arrearages owing
by former tenant.*

The Public Service Commission has authority to determine the reasonableness of the rules and regulations of a public utility company.

A rule which requires a tenant to pay for arrearages of water rent owing by a former tenant is unreasonable when other rules of the company provide for the cutting off of the service when the consumer is ten days in arrears, or for the deposit in advance of a certain sum by persons of doubtful financial responsibility.

In the Superior Court of Pennsylvania. No. 99, April Term, 1918. Appeal from order of Public Service Commission. Affirmed. (For opinion of the Commission, see 5 P. C. R. 590.)

McKee, Mitchell & Alter, for appellant.

Berne H. Evans, for appellee.

Lawrence M. Sebring, for intervening appellee.

KEPHART, J., Dec. 12, 1918:

We have held that the Public Service Commission has authority to determine whether the rules and regulations of utility companies are reasonable. The appellant's rule under consideration would require arrearages of water rents or service of a former owner to be paid by a successor in title as a condition precedent to service. In determining the reasonableness of the rule, consideration must be given, not only to the benefit the company derives from the rule, but the obligation or charge it seeks to enforce on the public that is affected by it. If the rule causes customers to assume the charges of other customers, to which they are not a party, or for which they are in no way responsible, there should be some good reason given to sustain the rule; and if the end sought to be attained by such rule may be secured by other equally effective rules, then the Commission should not be charged with unreasonableness if they declare the rule itself to be unreasonable and oppressive. The company, by one of its rules, provides that the service may be cut off when a consumer is in arrears ten days. In another rule, the company may demand from all such persons and all persons whose ability to pay may be doubted, deposits or security in advance. These provisions amply protect the company and when enforced meet the purpose of the rule under consideration. If utility concerns permit their bills to run along without enforcing reasonable requirements and employing ordinary business precaution, they are just as much at fault as the man who refuses to pay the account. Certainly, their dilatoriness should not be visited on the incoming tenant, who did not contract the bill, and should not be required to pay it.

Prior to the Act of 1913, the courts had to some extent considered the question of rules and inferentially, at least, their rea-

sonableness. *Girard Life Ins. Co. v. Philadelphia*, 88 Pa. 393; *Commonwealth v. Philadelphia*, 132 Pa. 288; *Brumm's Appeal*, 22 W. N. C. 137; *Miller v. Wilkes-Barre Gas Co.*, 206 Pa. 254; *Kohler v. Reitz*, 42 Pa. Super. Ct. 350. Whatever may have been the attitude of the courts on these questions prior to the Act of 1913, the question as it is now presented is clearly a matter for the Public Service Commission. *Rochester B. & L. A. v. Beaver V. W. Co.*, 68 Pa. Super. Ct. 122, 5 P. C. R. 459; *Bellevue Boro. v. Ohio Valley W. Co.*, 245 Pa. 114, 5 P. C. R. 9; *Panther Valley Water Company v. Public Service Commission*, 6 P. C. R. 545. There is no question that under the Public Service Act the company could make a rule applicable to the payment of their bills for service, and if the rule complained of was the only method that could be adopted to secure payment, the reasonableness of the rule would be clear. The public served is forced to take the utility because the company is the only concern that furnishes it, and the company is compelled to furnish this service to the public. While the rule under discussion does not in effect place a lien on the property, it operates in much the same way, as it deprives the land of a very essential necessity, without which the property would not be rentable, nor would it bring a price in the market commensurate with its true worth. The order of the Commission is clearly within its power, and there is nothing in the evidence which would warrant the court's interference.

The order of the Commission is affirmed at the cost of the appellant.

PGH., BESSEMER & LAKE ERIE RAILROAD CO., AND BESSEMER & LAKE ERIE RAILROAD CO., APPELLANTS, *v.* PUBLIC SERVICE COMMISSION, APPELLEE, AND BALTO. & OHIO R. R. AND PITTSBURGH & WESTERN RAILROAD, INTERVENING APPELLEES.

Railroads — Crossings — At grade — Elimination of — Apportionment of cost.

In apportioning the cost of the elimination of a grade crossing, the Commission is bound by no fixed rule. All the factors entering into a division of the cost should be taken into consideration and carefully examined. When, after consideration of the evidence submitted, the Commission has

apportioned the cost, the courts will not review the same, as to do so would be merely to substitute the opinion of the court for that of the Commission.

In the Superior Court of Pennsylvania. No. 81, April Term, 1918. Appeal from order of Public Service Commission. Affirmed.

Templeton & Whiteman, and *Reed, Smith, Shaw & Beal*, for appellants.

Berne H. Evans, for appellee.

W. B. Linn, *H. B. Gill*, and *R. P. Scott*, for intervening appellees.

KEPHART, J., Jan. 3, 1919:

The State Highway Department petitioned the Public Service Commission to issue a Certificate of Public Convenience approving the construction of a bridge in Butler which would span the Connoquenessing creek, Pittsburgh, Bessemer & Lake Erie Railroad, and the Pittsburgh & Western Railroad, and apportion the cost thereof among the railroad companies, the municipal corporation, and the Commonwealth. This bridge would abolish the grade crossings in the borough over the railroads. The advisability of making this improvement is not questioned. The Commission made an order apportioning the cost, thirty-four per cent. to be paid by the borough, thirty-two per cent. by the county and State, and, the part here in controversy, twenty-six per cent. by the Pittsburgh, Bessemer & Lake Erie Railroad, and eight per cent. by the Pittsburgh & Western Railroad. The Pittsburgh, Bessemer & Lake Erie Railroad, controlled by the Bessemer & Lake Erie Railroad, objected to this apportionment and alleged that it is unreasonable, without evidence or against the manifest weight of the evidence. They do not object to the part to be paid by the borough, county, and State, but they do say that the disparity in the respective assessments between the railroads is unfair. The appellant's right of way is eighty-two feet at this point, and the Pittsburgh & Western Railroad's, controlled by the Baltimore & Ohio Railroad, hereinafter termed the appellee, is forty feet. The appellant is a double-track railroad, conducting a through business and passes on an average of forty-four trains in

twenty-four hours over the crossing to be abolished. The appellee is a single-track railroad, passing thirty-seven trains in the same length of time over the crossing, not including switching movements. Between Connoquenessing creek and the appellee's right of way there is a tract of land, approximately two acres, on which is located some factories. The bridge will entirely abolish all grade travel over the appellant's road and will abolish grade travel over the appellee's road with the exception of that incident to these factories, which may be considerable. A better opportunity is at present afforded pedestrians and drivers of vehicular traffic to observe the approach of trains along the appellant's system by reason of its width of right of way than at the appellee's grade crossing where buildings obstruct the view. The Commission had the benefit of the testimony of witnesses, engineers, and the Commission's chief engineer, officials of the Commonwealth, plans, photographs, and the conferences between the respective parties. It also appeared that the appellant, in order to elevate its tracks and reduce its grade had the bridge raised seven feet, necessitating an additional expense. The Commission, in the apportionment of the cost, cannot be limited to any fixed rule; all the factors which enter into a division of costs should be taken into consideration and carefully examined. It would be almost impossible for this court, exercising an appellate jurisdiction, to go into the minute details of all the questions presented in such issues and sit as an administrative body to determine what would be just. From the evidence submitted, the Commission arrived at what they believed to be a fair ratio and after reargument, wherein the various positions of the railroad were fully discussed, the Commission made the final order, part of which is now complained of. Any other division that we might suggest would be merely an expression of our opinion as to what would be proper and it is entitled to no greater weight than that of the Commission's, appointed to hear and determine these matters. "It would be a substitution of our judgment for that of the Commission's." *Ohio Valley Water Co. v. Public Service Commission*, 260 Pa. 289, 6 P. C. R. 60, and of course this we cannot do.

The number of trains operated over a given road is not always the determining factor. A company may be in almost constant use of a grade crossing by shifting, and while it may be an annoy-

ance to the traveling public, it is not dangerous in that the movement of the cars is usually very slow and may be stopped within a few feet. A single-track railroad is not as dangerous at a grade crossing as a double-track railroad. The pedestrian or driver knows when a train passes on a single-track road he may immediately cross, but on a double-track system there is always danger of trains coming in the opposite direction, or, as frequently happens, trains moving the same direction on both tracks of the double-track system. The Commission, no doubt, considered the dangers, inconveniences, and liability for damages existing at grade crossings as being factors weighing in the ratio of cost. The amount of right of way does not necessarily determine the question, although it has a strong bearing on the situation. It may be possible that a railroad having a very small amount of business and with but one track would own a considerable width of right of way at one or more points. If the policy of the company is to adopt over any portion of its line a width of right of way which could be called extensive, that is, beyond that ordinarily used, that is a factor which should be taken into consideration in assessing the cost, but if the right of way happens to be wide only at this particular point, and for no special purpose, it must be seen that such additional width adds no material value to the company's property as such. When located at a grade crossing it is of benefit only as it tends to reduce damages for grade crossing accidents because pedestrians and drivers may see a greater distance as they approach the crossing. But all of these questions and many others pertinent to the inquiry were before the Commission by the maps, plans, photographs, and testimony. There is no good reason for this court to declare such an order unreasonable or not in conformity to law.

The order of the Commission is affirmed at the cost of the appellant.

BETHLEHEM CITY WATER COMPANY, APPELLANT, v. THE PUBLIC SERVICE COMMISSION, APPELLEE, AND NORTHAMPTON COUNTY WATER COMPANY, INTERVENING APPELLEE.

Water companies—Extensions—Approval of by Commission—Jurisdiction—Charter rights.

An order of the Public Service Commission authorizing extensions by a water company into an adjacent township will not be reversed at the instance of another water company claiming charter rights in the same territory. An order of the Commission can neither add to nor subtract from the rights of such a company, it is based solely upon considerations of public convenience.

An appeal from an order of the Commission, either granting or refusing a Certificate of Public Convenience, cannot be made a substitute for a writ of quo warranto or other legal proceedings in which it may be judicially determined what franchises, claimed by any chartered company, are active and in full force.

In the Superior Court of Pennsylvania. No. 20, March Term, 1918. Appeal from order of the Public Service Commission. Affirmed.

J. Davis Brodhead, and *Beidleman & Hull*, for appellant.

Berne H. Evans, for appellee.

R. S. Raylor, for intervening appellee.

HEAD, J., Dec. 12, 1918:

The Northampton County Water Company was incorporated January 6, 1916, for the purpose of supplying water to the public in the Borough of Freemansburg, in the said county. In April, 1917, it received a petition from a number of lot owners in Bethlehem Township, but adjacent to the Borough of Freemansburg, asking it to extend its pipes into the said adjacent territory where a considerable demand for a water supply had suddenly arisen. In undertaking to avail itself of the privileges conferred by the Act of 21st May, 1901, P. L. 270, it applied to the Public Service Commission for the Certificate of Public Convenience which under the Public Service Law it was obliged to secure before its original charter rights could be extended. The Bethlehem City Water Company, the present appellant, appears to be the legiti-

mate owner of a franchise to supply the inhabitants of the Township of Bethlehem with water unless such franchise has lapsed or been forfeited by non-user. That company protested before the Public Service Commission against the granting of the certificate prayed for. Public hearings were had, a considerable mass of testimony was taken, and after due consideration it was determined by the Commission that the certificate prayed for should issue. An order was consequently made, and from that order the Bethlehem City Water Company takes this appeal.

We think it proper to state at this time that, in the judgment of this court, an appeal from an order of the Public Service Commission, either granting or refusing a Certificate of Public Convenience, cannot be made a substitute for a writ of quo warranto or other legal proceedings in which it may be judicially determined what franchises, claimed by any chartered company, are active and in full force. In granting a Certificate of Public Convenience the Commission confers no new chartered powers on any company. It takes away from no company any right or power then legally existing. As it is not a judicial body but an administrative one, its order, made from the standpoint of the public convenience solely, cannot be made the foundation for the judicial determination of what franchises do or do not belong to any corporation interested. Such matters must be determined as heretofore in a legal proceeding properly instituted in the courts for that purpose.

If we concede the appellant water company has a franchise that would enable it to supply water to the citizens of the Township of Bethlehem, we do not understand the order appealed from takes away any such franchise. Indeed, it is hard to see how it could be said to impair it or affect it in any way unless the appellant company may assert it possesses the exclusive franchise to furnish such a supply of water. No such claim was made to the Public Service Commission, nor does that tribunal assume jurisdiction to decide such a question. If the Commission could not determine that the Northampton County Water Company was about to usurp any franchise vested in the appellant company, how can the latter be said to be aggrieved by the order complained of? It still possesses every chartered power and franchise with which it was legally invested before the order of the Commission was made. The

courts are open to protect it against any unwarrantable intrusion upon these rights.

How then may we say, upon this appeal, that the order complained of was an unreasonable order? The questions involved are of a character that makes it clear to us that they must be finally determined by the courts. We are not departing from the principle declared by our Brother Kephart in *Relief Water Company v. The Public Service Commission*, 63 Pa. Sup. Ct. 1, 3 P. C. R. 442, where it was said: "The Commission should not be a party to what is manifestly an open violation of the law." Had we such a case before us, we would be well within our rights, even in an appeal like the present one, in so holding. But, as already stated, we cannot here determine that the appellant company has any exclusive right to supply all of the inhabitants of Bethlehem Township with water. If it has not, it continues to be difficult to perceive wherein it is a party aggrieved by the order complained of, which simply permits the petitioner company to proceed with the exercise of the chartered powers and franchises it claims to possess under the laws of the Commonwealth. We cannot therefore say, from the record before us, that the order complained of is either unreasonable or not according to law.

The order of the Public Service Commission is affirmed and the appeal dismissed at the costs of the appellant.

SUPREME COURT OPINIONS.

CALLENDER I. LEIPER, APPELLEE, v. THE BALTO. & PHILA. RAILROAD CO. AND THE BALTO. & OHIO RAILROAD COMPANY, APPELLANTS.

Rates—Railroad companies—Violation of contract—Public Service Company Law—Jurisdiction of Commission—Equity—Injunction.

The Public Service Commission is the tribunal which in the first instance shall pass upon the reasonableness of rates.

A court of equity has no jurisdiction to enjoin a carrier from charging and collecting a rate in excess of that fixed by contract when the rate

charged is established by a tariff on file with the Public Service Commission.

Rate-fixing contracts are presumed to have been entered into with a knowledge of the right of the Commission to review the same in the exercise of the police power of the state vested in them by law.

Rates established by contracts with public utilities, whether said contract be for a definite or indefinite period, are void when different than those established by the Commission.

In the Supreme Court of Pennsylvania. No. 166, January Term, 1917. Appeal from the Court of Common Pleas No. 4 of Philadelphia County, 1916, March Term. No. 3378, in Equity. Reversed. (For decision of lower court, see 5 P. C. R. 178.)

William B. Linn and *H. B. Gill*, for appellants.

Lewis Laurence Smith, for appellee.

Fox, J.:

Callender I. Leiper, the appellee, filed a bill in equity against the Baltimore & Philadelphia Railroad Company and the Baltimore & Ohio Railroad Company, praying for an injunction restraining the defendants from exceeding the rates specified in a contract made on the 15th day of March, 1887, between George M. Lewis, who was then the owner of certain stone quarries on a tract of land in the Township of Springfield, County of Delaware, State of Pennsylvania, and the Baltimore & Philadelphia Railroad Company.

The agreement in question in its second paragraph provided that the parties of the second part, and their successors, would transport in cars to be furnished by them stone of the parties of the first part from the quarries to any point on the line of their railroad between Fairview and the City of Philadelphia, and to all points in the Schuylkill River Railroad and its branches, at a rate of freight not more than forty cents per ton, and that the actual freight to be charged from the said quarries to Philadelphia and to all other points which may be or become competitive shall not exceed competitive rates. There was a further agreement to transport stone from the quarries to the landing on Crum creek for the sum of five cents per ton, or one dollar per twenty-ton car. The company also agreed to transport stone from the quarries to

any sidings of the company in the City of Chester and in the contiguous boroughs at a charge not exceeding twenty-five cents per ton.

By a conveyance dated the 19th of August, 1905, the appellee acquired all the estate, right, title and interest owned by the said George M. Lewis at the time of his death in and to the assets of a partnership formerly existing between him and the plaintiff, and in and to said quarries, including particularly the rights vested in the said George M. Lewis under the aforesaid agreement dated March 15, 1887, and the appellee thereby became the absolute owner of the quarries as well as the rights arising out of this agreement.

The consideration of the agreement was the grant of a right of way through and over the land appurtenant to the quarries, which, at the time of the agreement, was owned by the said George M. Lewis. The railroad company was also required by a provision of the agreement to locate a station at Avondale. Subsequently the Baltimore & Ohio Railroad Company, the other defendant, acquired by contract of leasing the property of the Baltimore & Philadelphia Railroad Company, and at the time of the filing of the bill was operating said line of railroad. It is conceded that the appellants have kept in every respect the terms and provisions of the agreement until the 22d day of February, 1915, when, in pursuance of the terms and provisions of the Public Service Company Law of Pennsylvania, the railroad company having filed with the Public Service Commission a freight tariff raising the rates in question claimed that it was entitled to collect from the appellee forty-two cents and twenty-six cents in place of the rate fixed in the agreement, namely, forty cents and twenty-five cents.

The learned judge of the court below finds as a fact that the freight tariff was duly printed, posted, and filed according to the Public Service Company Law of Pennsylvania, and became effective February 22, 1915, and that accordingly forty-two cents and twenty-six cents, respectively, became the lawful rates for the transportation of commodities described in the agreement in question between the points named in said agreement. The appellee made no complaint to the Public Service Commission of Pennsylvania as to the reasonableness of the rate thus fixed in the freight tariff by the railroad company, nor has he made any complaint to

the Public Service Commission setting forth the facts alleged in the bill of complaint filed in this case, nor has he asked for any relief or made any application of any character to the Public Service Commission relating to the facts developed in the case at bar. Notwithstanding this fact the learned judge of the court below held that the defendant was without legal right to require from the plaintiff the payment of the rates fixed in said freight tariff for the transportation of stone, and held that as the rates already paid since February 22, 1915, were paid under protest, it was the duty of the defendant to refund to the plaintiffs the excess received by them, with interest thereon. The court further directed that an injunction issue, perpetually restraining the defendant from demanding or exacting from the appellee a higher rate for the transportation of stone within the State of Pennsylvania. Defendants were further commanded to receive and transport stone at the rates fixed in the agreement.

Under these facts has the court jurisdiction to make the decree that was entered in this case? One of the purposes of the passage of the Public Service Law was the creation of a tribunal by which the rates to be charged by public service companies in the State might be established. These rates must be reasonable in amount and must apply equally to all shippers. In the case of *Armour Packing Company v. United States*, reported in 209 U. S. 56, considering a somewhat similar question, the court said: "It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by the publication of tariffs, and forbidding rebates, preferences and all other forms of undue discrimination." The language of the Act of 1913 creating the Public Service Commission, in defining its powers, gives the Commission much the same powers as the Inter-state Commerce Commission under the Act of Congress, and the language used by Mr. Justice DAY in the case just quoted applies with equal force to the language of the Act of 1913. To permit the contract made between the appellee and appellants to stand as against rates established in a legal and orderly method and in conformity with the provisions of the law would be to nullify the purposes of the act. It would be impossible for the Commission to enforce an

equality of reasonable rates, except upon the basis that it is not bound by contracts previously entered into between a public service company and either a municipality, another corporation, or a private individual. The basis upon which this conclusion must rest is that under the Constitution of Pennsylvania, Article XVI, Section 3, it is provided: "The exercise of the police power of the State shall never be abridged or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals or the general well-being of the State."

Where, therefore, the rights of individuals under a contract which would otherwise be perfectly valid are in conflict with the "general well-being of the State," the rights of the individuals must give way to the general welfare. It therefore follows that when, as in this case, the parties enter into a contract with a public service corporation relating to rates, they are presumed to have done so with the knowledge that the right of the State to exercise this police power in the future is expressly reserved, and that where the common weal and the interests of the public demand that the provisions of the contract thus entered into shall be modified. It can be done without any violation of the provision of the Constitution of the United States with reference to the impairment of the obligation of contracts.

A public service company is granted its franchise by the State so that it may properly and efficiently serve its people. This grant is made subject to the reserved power of the Commonwealth to supervise and regulate the exercise of the franchise, and in the case of rates, to increase or decrease them as the public interest, as distinguished from mere private interest, may demand. It was necessary, therefore, to have some tribunal to regulate and determine questions of this character relating to the reasonableness of rates, and the legislature has wisely provided such a tribunal in the Public Service Commission. The fact that the action of the Public Service Commission can by proper proceedings be reviewed by the courts furnished the appellee with a full opportunity to be properly protected in the enjoyment of his rights. If the rate fixed in his contract is under all the circumstances a proper rate, this can be judicially determined. The fact that no complaint was made to the Commission when the change of the

rate was filed does not prevent the appellee from subsequently entering a complaint of this character. Article V, Section 4, of the Act of July 26, 1913; *Baltimore & Ohio Railroad Company v. Public Service Commission*, 66 Pa. Super. Ct. 403, 5 P. C. R. 1.

The question here presented is not new, but has arisen in a number of cases recently decided by this court in which it is held that, as the law now stands, in cases of this character a court of equity is without the necessary jurisdiction to make a decree.

In the case of the *St. Clair Borough v. Tamaqua & Pottsville Electric Railway Company, et al.*, 259 Pa. 462, 6 P. C. R. 33, this court said:

"Since the Public Service Company Law has been upon our books, we have consistently adhered to the rule that matters within the jurisdiction of the Commission must first be determined by it, in every instance, before the courts will adjudge any phase of the controversy (*Bethlehem City Water Company v. Bethlehem Boro.*, No. 2, 253 Pa. 333, 337-8; *New Brighton Boro. v. New Brighton Water Co., et al.*, 249 232, 242); and it is plain that orderly procedure requires an adherence to this practice, otherwise different phases of the same case might be pending before the Commission and the courts at one time, which would cause endless confusion. Under the established system, the Commission, in the first instance, passes upon all changes of rates made by public service corporations, subject to a proper and well regulated review by the courts, when and where all questions of law may be raised and determined; and this is not so because the courts have any desire to avoid the performance of duties cast upon them by the law, but because the people, speaking through the legislature, have declared that these duties shall be performed by a special tribunal created for the purpose."

In the case of *Bellevue Borough v. Ohio Valley Water Co.*, 245 Pa. 114, the court said:

"If the case in any of its aspects involves the reasonableness or unreasonableness of water rates, it is a sufficient answer to say that the section of the Act of April 29, 1874, P. L. 73, which gave courts the power to determine questions of this character was repealed by the Public Service Company Law, approved July 26, 1913, P. L. 1374. In other words, the legislature took this power away from the courts and conferred it upon the Public Service Commission. Hereafter, so long as the Act of 1913 remains in force, the question of reasonableness of rates established by public service corporations, must in the first instance be submitted to the Public Service Commission when challenged. This is now the declared statutory policy of the law, and it is binding not only upon the interested parties, but upon the courts as well. We do not know that this position is seriously controverted by learned counsel for either side of the present controversy."

The view adopted in the *St. Clair* case, *supra*, has been adopted in the late case of *Klein-Logan v. Duquesne Light Company*, 57 October Term, 1918 (6 P. C. R. 170), and in *V. and S. Company v. Gaslight Company*, 92 January Term, 1918, 261 Pa. 523. In both these cases the court held that equity was without jurisdiction to enforce a rate contract, and that the application must be made in the first instance to the Public Service Commission.

We feel that the question of the binding effect of the contract such as we have here in controversy upon the jurisdiction of the Public Service Commission is sufficiently relevant to justify its consideration at this time. Some of the earlier cases have suggested a distinction with reference to contracts of this character. This court has held that contracts fixing rates which are for an indeterminate period will not be sustained. This perhaps carries with it the implication that a contract for a determinate or definite time might be sustained, although this has not been definitely decided. We have reached the conclusion that this is a distinction which ought not to be maintained. Where parties enter into a contract which relates to a matter which may subsequently be the subject of revision by the State in the exercise of its police power, their contracts, whether definite or indefinite in point of time, must be held subject to the right of the State to act in regard

thereto. They cannot allege that the contracts, so far as the State is concerned, are inviolable. It is not, as we have already pointed out, in the interest of the parties to the contract, or either of them, that the contract may be revised or modified, but because of the greater good resulting to the public at large.

In *Turtle Creek Borough v. Pennsylvania Water Company*, 243 Pa. 415, Mr. Justice ELKIN said:

"In conclusion it may not be improper to remark that these appeals contain many incidental and interesting questions of law, which we do not deem vital to the decision of the present case, and therefore have refrained from discussing or deciding them. These questions will arise under the Act of July 26, 1913, P. L. 1374, known as the Public Service Company Law, and it would be unwise to anticipate their decision at the present time and under the old law."

This case had its inception prior to the passage of the Public Service Company Law, and hence the effect of the Act of 1913 could not be properly considered or determined. This was followed by an opinion by the same justice in the *Borough of Bellevue v. The Ohio Valley Water Company*, 245 Pa. 114. In that opinion, in referring to the case of *Turtle Creek Borough v. Pennsylvania Water Company*, *supra*, the court said:

"We did not then decide whether a contract between a borough and a water company, for a definite term of years and for specified rates during the limited term, would be enforced as between the parties, because that question was not then raised; and it is not raised now, so that this will be left as an open question until it is presented in concrete form upon facts calling for a decision of the point. We did decide in that case that a contract of this kind, unlimited by its terms, and hence indeterminate as to time, could not be enforced indefinitely, and must give way to the general policy of the law under which the legislature created a special tribunal to pass upon and determine questions relating to the reasonableness of rates charged by public service corporations."

There seems to be no difference in principle between the case of a contract indeterminate and one that is determinate, nor is

there any difference in principle between a contract with a borough, with a corporation, or with an individual. Any contract of this character, whether for a definite or indefinite period, must give way when its terms conflict with the rates fixed in the method prescribed by the Public Service Act of 1913.

We hold that the court below was without jurisdiction to make the decree prayed for, and that the appellee must be remitted to his remedy of filing a complaint with the Public Service Commission, under the provisions of the Act of June 26, 1913. The decree is therefore reversed and the bill of complaint dismissed, at the costs of the appellee, without prejudice to the right of the appellee to apply to the Public Service Commission.

PUBLIC SERVICE COMMISSION.

HENRY J. SCHAAD *v.* LEHIGH VALLEY RAILROAD CO.

Railroads—Train service between Towanda and Wilkes-Barre.

Two trains which were discontinued during the war were ordered restored for the accommodation and convenience of the public.

COMPLAINT DOCKET No. 2571.

Report and Order of the Commission.

See 6 P. C. R. 558.

John G. Scouton, for complainant.

R. W. Barrett, for respondent.

BRECHT, Commissioner:

This is a second complaint filed by complainant in which he again prays for the restoration of the two passenger trains which were discontinued by respondent on its line of railroad from Wilkes-Barre to Towanda, on the 26th day of May, 1917. One of these trains left Wilkes-Barre at 3:30 p. m., for Towanda; the other left Towanda at 5 p. m., for Wilkes-Barre.

In a former proceeding before the Commission the issue raised in this complaint was submitted for determination, and after having been duly heard and the matters and things involved therein duly investigated, the complaint was dismissed with leave given to complainant "to file another complaint, if he so desires, praying for the train service which he is now seeking, after the crisis precipitated by the war is over."

In its report upon the original complaint under date of May 20, 1918, the Commission said among other things:

"But it is clearly shown by the testimony that the complainant and the communities in interest experience considerable inconvenience amounting in some instances to a practical hardship by reason of the discontinuance of the morning train from Wilkes-Barre, and the evening train out of Towanda. Under normal conditions in the railroad traffic of the country this train service should not have been discontinued, and respondent so admits. Ordinarily these trains would be found proper and necessary for the convenience and accommodation of the public, and if taken out of the service under such circumstances should be restored to it and regularly operated.

"But the country is passing through the pressure of an extraordinary crisis when it has become necessary that the resources of the nation should be conserved with the utmost vigilance to the end that the government may possess itself of its maximum power and efficiency. This end can be achieved only through the sacrifice and co-operative service of our people in the smallest as well as the most populous community.

"The conveniences and privileges which they enjoyed in less strenuous times must give way, and for the time being at least, it becomes the patriotic duty of every citizen and municipality to carry its proportionate share of the national burden, even where it will mean fewer accommodations or a certain degree of injury to local business interests."

On December 17, 1918, the complainant maintaining that railroad traffic has practically assumed a normal basis, filed a new complaint praying for a final adjudication of his case.

From the testimony in the present complaint it appears that by reason of the discontinuance of the jitney service from complain-

ant's locality to the Borough of Towanda the public is at present put even to greater inconvenience than when the case was originally heard. Persons are now no longer able to go from Bernice and other points along the route to Towanda, the principal business center of that section, and return the same day as could be done when the jitney was in operation, but are obliged to spend a whole day and two nights in the town of Towanda in order that they may transact any business there.

It would therefore appear from the standpoint of public convenience and accommodation that the situation has become more burdensome and that some relief should be accorded to the localities affected. When the prayer of complainant was denied in the first instance it was done because of the critical situation in railroad traffic created by the war. Carriers were directed to cut down the passenger service upon all their roads in order that freight transportation might be pushed to its maximum limit. As a result there was marked conservation in man-power and engine-power more or less upon all railroad systems of the country.

The period has now passed when railroad companies are called upon to make this nation-wide sacrifice for the general welfare of the government. While commerce and business have not assumed their normal equipoise, the occasion for special concentration in rail traffic no longer exists. Train movements and shipments over railroads are approaching to an appreciable degree the static level of pre-war days, and have apparently reached a point when the public may justly demand a measure of the privilege formerly enjoyed by it, especially where it is reasonably established that such concession would be for the accommodation, convenience and safety of the general community.

Because of this change and changing condition in railroad traffic since the active period of the war, and the former conditional finding of the Commission in this case, an order will be drafted directing the respondent, the Lehigh Valley Railroad Company, to restore the two passenger trains prayed for by complainant, and have the same placed on regular schedule service between the City of Wilkes-Barre and the Borough of Towanda within thirty days from the date of issue of this report and order.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, February 24, 1919, the Lehigh Valley Railroad Company, respondent, is *hereby ordered* to restore to operation and service over its Bowman's Creek Branch the two passenger trains which it discontinued on May 26, 1917, to wit: the train which left Wilkes-Barre for Towanda at 3:30 p. m., and the train which left Towanda for Wilkes-Barre at 5:00 p. m., daily, except Sundays.

It is further ordered: That said service be restored by said Lehigh Valley Railroad Company, respondent, within thirty (30) days from date hereof and be thereafter maintained on regular scheduled service.

By the Commission,
WM. D. B. AINEY, *Chairman*.

L. B. LANDIS AND JOSEPH MARTIN, TRADING AS LANDIS TAXI SERVICE *v.* C. B. HENRY, J. B. DRURY, AND E. P. CHRISIE.

Autobusses—Operation of without consent of the Commission.

Complaint was made alleging that the respondents had been operating autobusses for hire between the Borough of Cresson and the Cresson State Sanatorium in violation of the order of the Commission. It was also shown that the complainants had been authorized to operate over said route, and that the activities of the respondent worked an injury upon the complainants.

The respondents were ordered to discontinue said service immediately, any further evasion of the order of the Commission to be punished by the statutory fine.

COMPLAINT DOCKET No. 2621.

Report and Order of the Commission.

Ralph J. Baker, for complainants.

W. H. Burd, for respondents.

McCLURE, Commissioner:

On January 14, 1918, a Certificate of Public Convenience was issued to the complainants for the operation of a line of autos or autobusses between their office opposite the Pennsylvania Railroad station at Cresson and the Cresson State Sanatorium, over a named route largely the William Penn Highway and through the Village of Summit (A. 1704—1917).

The respondents filed an application (A. 1998—1918) for the approval of the beginning of operation of autobusses over the same route and between the same points; also for approval of doing a general hack business in Cresson Borough. On October 22, 1918, the first prayer was refused and a certificate was granted to operate on call or demand service between points within the Borough of Cresson and between points within and points contiguous or nearby territory except between the Cresson passenger station and the Pennsylvania State Sanatorium.

Notwithstanding the refusal of the Commission to grant the respondents the right to operate between the railroad station and the sanatorium and the limitations contained in their certificate, the evidence discloses many violations of the order. Some, no doubt, may have been due to their failure to grasp the scope of the order, but many were deliberate evasions of it. Prospective passengers were sent to points close by the station and were picked up and carried through to the sanatorium; others were carried from the sanatorium to points adjacent to the station and there deposited. These were all wilful violations of the order. Passengers have also been carried between the station and the Village of Summit over the Landis route, a privilege which was not granted the respondents, although they seem to have been under the impression that had not been denied them and that they were within their rights in carrying to intermediate points, but they were not. The Landis taxi service had been given the right to

operate between the station and the sanatorium over a named route. This, of course, included all intermediate points. The respondents were expressly denied the right to operate between the said termini and it is clear that this denial also included all intermediate points.

The complaint is sustained. That there may be no possible misunderstanding in the future, the respondents will be ordered to desist from soliciting and carrying passengers from the Pennsylvania Railroad station at Cresson or the vicinity thereof, to the Pennsylvania State Sanatorium or points adjacent thereto; or from the said sanatorium or the vicinity thereof to the said railroad station or points adjacent thereto; and from soliciting or carrying passengers from either the railroad station or the vicinity thereof or the State Sanatorium or the vicinity thereof to Summit or other points intermediate of the station and the sanatorium or from Summit or other intermediate points to the station or the sanatorium or points adjacent thereto.

The Commission will not now enforce the penalty for violation of its order, as it might do under the circumstances disclosed in this case, but further evasions will subject the respondent to the penalty which the law imposes.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, February 25, 1919, It is ordered: That the complaint be and the same is hereby sustained.

It is further ordered: That C. B. Henry, J. B. Drury, and E. P. Christe, the respondents, and each of them, forthwith cease and desist from soliciting and carrying passengers from the Pennsylvania Railroad station at Cresson, or the vicinity thereof, to the Pennsylvania State Sanatorium, or points adjacent thereto; or

from said sanatorium or the vicinity thereof, to said railroad station, or points adjacent thereto.

It is further ordered: That said respondents and each of them cease and desist from soliciting or carrying passengers from either the railroad station or the vicinity thereof, or the State Sanatorium or the vicinity thereof, to Summit, or other points intermediate of the station and the sanatorium; or from Summit, or other intermediate points, to the station or the sanatorium, or points adjacent thereto.

By the Commission,

WM. D. B. AINEY, *Chairman.*

BOROUGH OF KANE, ET AL., v. SPRING WATER COMPANY.

Water companies—Rates—Service—Rules and regulations—Ownership of fire hydrants—Valuation—Going concern value.

It was complained that the rates of respondent were excessive, its rules and regulations unreasonable, and its service inadequate.

In determining the reasonableness of the rates, the Commission fixed the valuation of the used and useful property of the respondent at \$200,000, which included an allowance for going concern value. Allowing seven per cent. for return, \$15,000 for operation, and \$1,708.11 for depreciation, the annual gross income to which respondent is entitled was fixed at \$30,708.11, or \$11,000 less than the rates complained of produced.

The respondent was ordered to purchase all fire plugs from the borough, increase the rates for fire protection, and decrease those for domestic service. The service was held to be adequate, and certain rules and regulations were nullified.

COMPLAINT DOCKET No. 1380.

Report and Order of the Commission.

William S. Snyder and Clarence B. Miller, for complainant.

J. E. Mullen, for respondent.

AINEY, *Chairman:*

The Borough of Kane, in McKean County, with a population of upwards of 7,000, is situate on the westerly slope of the Alle-

ghenies at an altitude of about 2,000 feet. It is exclusively served by the respondent, the Spring Water Company.

On April 9, 1917, the borough authorities and several of its residents filed their complaint, alleging that respondent's rates for both fire and domestic services were excessive and illegal, its service inadequate, and certain of its rules and regulations relating to the tapping of its mains and to its meter service unreasonable. Respondent made denial of all allegations.

The Spring Water Company was incorporated July 5, 1887, to serve the Borough of Kane and adjacent territory. It began its service in 1888. Respondent filed a schedule of rates on February 18, 1915, effective April 1, 1915. It is to this schedule that complaint is made. In 1916 the company had 1,425 patrons, 976 on meters and 449 on flat rate service. Respondent owns and operates two systems, one which supplies potable water for domestic service, and one nonpotable water to the Pennsylvania Railroad Company for engine purposes. The source of supply for both systems is on the Hubert run property of respondent of about 355 acres, situate about one-half mile from the borough line. Its service is unfiltered. The supply for its potable system is taken from springs and wells pumped into two reservoirs, having a capacity of 160,000 and 330,000 gallons, respectively, from which it is pumped into a high pressure distribution system. This system is also sustained by a standpipe 16x100 with a capacity of 150,000 gallons.

Its nonpotable system is taken direct from Hubert run into a reservoir from which it is pumped by a separate main to the Pennsylvania Railroad.

Natural gas is used for power. Its pumping system is constructed that it may be used interchangeably for either system. In 1916 it supplied the meter patrons on its potable system 73,426,042 gallons, and the Pennsylvania Railroad through its nonpotable system 108,071,000 gallons. Income of respondent: (p. 234.)

In addition to its Hubert run property, respondent owns ten acres in fee and has certain water rights on about 450 acres of land on its Anderson property so-called, which it does not utilize. This property is located about one and one-half miles north of

1916.

One thousand four hundred and twenty-five meter and flat rate patrons	\$29,440	30
Pennsylvania Railroad Company	8,685	28
Fire service to borough	2,315	84
Private fire service	658	75
Other sources,	102	12
Total	\$41,202	29

1917.

Pennsylvania Railroad Company	\$9,457	22
Fire service to borough	2,315	84
All other sources	29,614	12
Total	\$41,387	18

1918.

Pennsylvania Railroad Company	\$8,976	77
Fire service to borough	2,315	84
All other sources	30,617	46
Total	\$41,910	07

Kane. It also owns the lot, 100x100, on which its standpipe is located, being the highest point in the borough, and has about 8,000 feet of right of way for mains. Water for sewer flushing and fire service is furnished to the borough through its potable system, pursuant to a contract expiring January 1, 1928, at an annual charge of \$2,250 for seventy hydrants. Additional hydrants will be paid for at a proportionate rate. The borough furnishes and maintains all hydrants.

By agreement engineering conferences were held and a reproduction cost of all of respondent's property, excepting the items of real estate, water rights and rights of way, promotion and organization, administration during construction, and going concern value, were agreed upon, based upon average prices covering a period of five years prior to April 1, 1917. The following is a summarized statement thereof. All items not agreed upon by the engineering conference except going concern value are supplied by the Commission.

REPRODUCTION COST NEW LESS DEPRECIATION.

1. Real estate {		
2. Water rights {		
3. Rights of way	2,112	50
4. Well system	16,885	28
5. Reservoirs	7,504	12
6. Pumping station equipment	37,286	67
7. Standpipe	5,645	00
8. Telephone line	460	00
9. Piping adjacent to station	2,018	00
10. Force mains and distribution system	95,706	20
11. Buildings	3,735	12
12. Real estate improvements	502	50
13. Office equipment	1,068	33
	<hr/>	
	\$183,773	72
14. Contingencies, 5% on all but Nos. 1, 2, and 3, \$170,811.22	8,540	56
15. Engineering, 5% on \$170,811.22 + \$8,-540.56 = \$179,351.78	8,967	58
16. Materials on hand	967	31
17. Organization and promotion	2,000	00
18. Administration during construction	2,400	00
19. Interest during construction:		
5% on Nos. 1, 2 and 3,		
\$12,962.50	\$648	13
3% on balance of \$170,-811.22	5,124	33
	<hr/>	
	5,772	46
20. Working capital	3,000	00
	<hr/>	
	\$215,421	63
Less depreciation	15,708	00
	<hr/>	
Reproduction cost new less depreciation	\$199,713	63

REAL ESTATE AND WATER RIGHTS.

Respondent's unused water rights on its so-called Anderson property on about 450 acres, were acquired in 1907 for \$1,375.00. The Borough of Kane is extending and its population is increasing, thereby making greater demands on respondent. It was to anticipate this future growth that prompted the company to safe-

guard its supply by the acquisition of these additional rights. The price paid is not exorbitant, and under all the circumstances we think the company acted wisely in acquiring them, and they should be included in any valuation to be made of respondent's property.

The testimony relating to the combined value of respondent's real estate and water rights is very conflicting, varying from the original cost to the company of \$4,181.98 for real estate, and \$3,-975.00 for water rights to upwards of \$60,000.00. Under all the evidence we think they should be included in its reproduction cost at \$10,850.00.

Some evidence was adduced that other sources of supply might be obtained in the proximity of Kane sufficient to serve the public therein. On account of the topographical conditions of the surrounding territory, we presume it is not improbable that this may be correct. Nevertheless, it cannot be assumed to be an absolute fact. The extent and permanency of any particular water bearing property can only be ascertained by actual tests and development and a continued use thereof for a period of years. While during dry seasons respondent's supply lessens in volume, there is no evidence that it has ever wholly failed. Under such circumstances we conclude that there is an element of value inuring in the property from which respondent secures its supply, which should be recognized over and above what the property originally cost or what other apparently water bearing property, undeveloped, may be obtained for.

RIGHTS OF WAY.

Respondent has 8,138 feet of right of way for its mains. Two thousand thirty-eight feet thereof is through land now laid out in borough lots, upon which sixteen houses have been erected, and in some instances the mains extend under buildings. The balance, 6,100 feet, extends through some well timbered land and partially cleared land. Much of the line was originally laid through primeval forest. The company paid out of its treasury only \$14.00 to acquire these rights. Much of it, however, was laid on lands in which the owners of the respondent were interested.

There is difference in the testimony as to the value of these rights of way, particularly as to that portion extending across the

improved town lots. We think it may be assumed that if the plant were reconstructed the mains would be located elsewhere. There is much force in the suggestion made by one of the witnesses that the reconstruction cost of so much of respondent's lines as extends across the improved lots should not exceed the cost to relay the same upon the streets of the borough, which the company has a right to occupy. Considering all the evidence relating thereto we have concluded that all of the rights of way of respondent should be included in its reproduction cost at \$2,112.50.

GOING CONCERN VALUE.

The propriety of making an allowance for the element of going concern value in a reproduction cost of the property of a utility has been adjudicated by the Supreme Court of the United States in the case of *Denver v. Denver Union Water Company*, P. U. R. 1918 C., page 640, wherein the said court, speaking through a unanimous opinion delivered by Justice PITNEY, approved its utterance on that subject in the case of *Des Moines Gas Company v. Des Moines*, P. U. R. 1915 D., 238 U. S. 153, which is as follows:

"That there is an element of value in an assembled and established plant, doing business and earning money, over one not thus advanced, is self-evident. This element of value is a property right and should be considered in determining the value of the property, upon which the owner has a right to make a fair return when the same is privately owned, although dedicated to public use."

Continuing, the court said:

"As was then observed, each case must be controlled by its own circumstances. In the present case, the master expressly declared that his detailed valuation of the physical property and water rights included no increment because the property constituted an assembled and established plant, doing business and earning money; and a careful examination of his very elaborate report convinces us that this is true. The amount allowed by him on this account is not open to serious question from the standpoint of appellants."

Respondent is serving a thriving community. It is an active going concern, rendering efficient service and earning returns for its stockholders. As such a going concern it has a value greater than if it were an idle plant. This will be considered in determining fair value.

ORIGINAL COST.

The books and accounts of respondent company were audited by the bureau of accounts and statistics of the Commission, also by Collins & Company, certified public accountants. There are no material differences in the two audits. Different conclusions are reached by adding or omitting from statements certain items on which the auditors differ as to the propriety of their being included. The audit as made by the Commission's bureau treats certain amounts paid to directors as salaries, as return to investors. This is done on account of the extent thereof, and is further justified by the fact that immediately upon the issue to the stockholders of a large amount of stock without anything being paid therefor, such payments were materially reduced. In the audit made by Collins & Company these payments are considered as salaries paid to directors for services.

The audit made by the Commission's bureau indicates that the original cost of respondent's physical property was \$173,509.55.

The audit made by Collins & Company makes the sum \$176,637.05. The difference of \$3,127.50 is made up as follows: The title to respondent's Hubert run property was involved in an ejectment suit, the Borough of Kane claiming to have some interest therein. In consideration of the borough relinquishing its claim thereto, respondent made reduction for seven years on thirty-one fire hydrants from \$15.00 to \$7.50 per annum, making a total of \$1,627.50, which we think should be added to and included in the original cost of respondent's property. The balance of said difference, to wit, \$1,500.00, was paid at various times for legal services. So much as was paid for services rendered in connection with the ejectment suit should, we think, be added to original cost. The amount paid for that purpose not being clearly indicated by the books of the company, the Commission will allow the sum of \$300.00 for that purpose, making the total original cost of all respondent's physical property \$175,437.05. In this

there is included, however, two items for property that are not in use at the present time. One of \$943.57, being the cost of a wooden tank replaced by the present steel standpipe, and one of \$1,375.00 for the water rights on the so-called Anderson property. The cost of the wooden tank should not be included in original cost. The water rights on the Anderson property we have in another part of this report held should be included in respondent's used and useful property. The total original cost, therefore, of all of respondent's used and useful property, as determined above, is \$174,493.48. Respondent has charged off on its books for depreciation \$25,985.37.

CAPITALIZATION.

The original authorized capital stock of respondent company in 1887 was \$40,000. In 1901 it was increased to \$100,000, and in 1907 to \$250,000, of which there is issued and outstanding \$220,000. In 1894 the company authorized the issue of \$20,000 of bonds. In 1907 this was increased to \$60,000. It has now issued and outstanding \$58,500 5% bonds, making a total of \$278,500 of stock and bonds. On February 23, 1907, when the company had outstanding \$69,000 of capital stock it authorized an increase thereof and soon thereafter pursuant to resolution issued 2,760 shares at par value of \$50 each, making a total of \$138,000, to Elisha K. Kane, one of the stockholders, as part consideration for property conveyed to the company, the balance of the consideration as set forth in the resolution being \$5,375 cash. Complainants contended that there was no consideration for the stock so issued to Elisha K. Kane. Respondent's counsel (see page 9 of testimony) conceded that it was not issued to Elisha K. Kane for property, but that the purchase of property was used by the company as a means to issue such stock which was distributed among the stockholders in proportion to their respective holdings. Prior to this issue of stock there was paid to the several directors of the company, annually, as salaries various amounts from thirteen to forty-two per cent. of their respective holdings. Since the issue of this stock the annual salaries paid to the directors have not exceeded 5.4 per cent.

From the audit made of respondent's books it appears that \$82,000 cash was paid into its treasury on account of capital stock, and assuming that the bonds were sold at par it received \$58,000 therefrom, making a total of \$140,500. The balance of its property was paid for out of income.

INADEQUATE SERVICE.

Complainants alleged that respondent's service is inadequate in two respects, viz: that the pressure is insufficient and at times the water as supplied to the patrons is roily. It was shown by the evidence that the pressure in some instances was not sufficient for its domestic patrons or fire service. The company contends the low pressure at certain dwellings results from the small size of the service pipe, and on account of their having filled with solid matter. Many of the original connections are one-half inch and were paid for by the patrons. All connections inside the curb line should be of sufficient size and of such character as not to reduce the pressure furnished by the service pipe in the street and should be laid in trenches below the frost line. The conclusion reached by the Commission is that whenever complaint is made, or it comes to the knowledge of respondent, that on account of the size or condition of the service pipe, inadequate pressure results to the patron, the respondent shall at its own cost replace such service pipe of proper size extending the same to the curb line, provided, however, that the patron will at his own cost continue the same into the building.

The pumping plant of respondent appears to be efficient and any lack of proper pressure for fire service must result from want of proper operation. The Commission will not make any order at this time relating to the pressure for fire service. If in the future there should be inadequate pressure, the attention of the Commission may be called thereto.

The water at respondent's source of supply is clear and free from sediment. It should be supplied to the patrons in the same condition. The muddy condition of the water furnished at dwelling houses and flowing from fire hydrants, indicates that the mains of respondent's distribution system should be thoroughly cleaned. The company will take proper steps to see that this is done.

The complaint made that the rules of respondent relating to cost and who shall be permitted to make connection of service pipes with the street mains, will not require any attention on the part of the Commission as hereafter all connections will be made by and at the cost of respondent.

FIRE HYDRANTS.

The fire hydrants now in use were paid for and are the property of Kane Borough. It asks that respondent be required to purchase the same. The value thereof has been practically agreed upon by the engineers. Respondent objects to purchasing the same, contending that it has, through the reduced rates charged for fire service in the past, paid for the same several times over. It is conceded that the amount paid by the borough in the past for fire service, as compared with the rates paid by domestic consumers, has been too small. The evidence in this case, however, indicates that the gross revenue received by respondent is greater than it should have been; therefore, the fact that the fire service rate has been too low cannot be urged as a reason against the purchasing of the fire hydrants by respondent.

The Public Service Company Law, in Article II, Section 1, provides:

"It is the duty of every public service company to furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate and practically sufficient for the accommodation and safety of its patrons, employees and the public."

Fire hydrants are a facility of a water company and should be owned by it. In re Hagar, P. U. R. 1918 E., page 451, the Idaho Commission held:

"To avoid a divided responsibility and secure safety and efficiency in operation, the utility should own and maintain the hydrants through which it furnishes water for fire protection."

Respondent should, within one year, purchase the fire hydrants owned by the borough and used by it in rendering fire service for

the sum of \$3,550, which amount is included in the fair value of respondent's property as a rate base in the conclusion of the Commission hereinafter made.

SERVICE TO PENNSYLVANIA RAILROAD.

The service rendered by respondent to the Pennsylvania Railroad Company, as indicated by its schedule, is at a lower rate than its service to other patrons. The water supplied is also of a different character. It will be conceded, we think, that the cost of serving a large amount of water to the Pennsylvania Railroad Company during a given period is much less than serving the same quantity to a large number of domestic consumers. It is for this reason that a utility is permitted to classify its patrons. General uniformity is all that is required. Too many classes of patrons may be objectionable, as well as too few.

There is no complaint here that the rate charged to the Pennsylvania Railroad Company for its service is discriminatory.

FINANCING.

In determining the rate base in this case, we have not allowed any sum for financing, as requested by respondent. This item is sometimes referred to as discount or brokerage. By whatever name it is called, it is intended to represent the sum that is required or allowed as a discount or commission, or perhaps both, for inducing capital to invest in the enterprise.

The Supreme Court in *Ben Avon Borough v. Ohio Valley Water Company*, P. U. R. 1918 D., page 49, 6 P. C. R. 60, held "that no allowance should be made for an item of this kind in the fixed capitalization of the company as a basis for a permanent charge against the public."

FAIR VALUE AND RETURN THEREON.

The Commission has before it the original and reproduction cost new less depreciation of respondent's plant, such reproduction cost new being based on normal prices. Taking these factors into consideration, as well as all other elements that should be considered therewith, and having due regard for all the conditions

under which respondent renders its service, including the fact that it is an active going concern earning a return for its owners, the Commission has reached the conclusion that the fair value of all respondent's used and useful property, as a basis upon which to compute its return is \$200,000. In this sum the Commission has included the amounts respondent will be required to pay to purchase the fire hydrant and meters as herein provided. The Commission has further concluded that upon this rate basis respondent should receive seven per cent. return.

OPERATING EXPENSE.

Complainants have asked us to fix the annual operating expense of respondent, not including any sum for depreciation, at \$14,468.10, while respondent asks that \$19,408.15, be set aside for that purpose. The engineering conference agreed upon many of the items to be included. Those not agreed upon are the cost of gas used for fuel, taxes and salaries.

Taking into consideration all the conditions under which respondent is operating, including its fuel supply, and with due regard for the advance in both labor and material costs, the Commission concludes that respondent should be allowed for operating expense, not including depreciation, the sum of \$15,000. In addition to this amount there will be allowed \$1,708.11 for an annual depreciation.

FIRE SERVICE.

Respondent is rendering fire service for which it is paid per hydrant, pursuant to a contract, the borough supplying and maintaining all hydrants. We have elsewhere in this report held the company should purchase the same. The amount heretofore annually paid the company for fire service, to wit, \$2,315.84, as compared with amount paid by its other patrons, is too small. With this view the complainants are in accord, stating in their brief (page 62) "Our suggestion is that the borough should pay annually \$4,500 for fire protection." Fire service is paid out of general revenue. The cost thereof should reasonably compensate respondent for the expenditure it has made, and is obliged to make, in order to stand ready at all times to meet the demand

that the borough may make upon its system in this respect. That the taxpayers and all of respondent's other patrons will pay their just share, the cost should be equitably distributed, otherwise the large taxpayers who receive benefit of fire service and consume little water would not pay their just share, and domestic consumers who are paying for a large amount of water and who pay a small amount of taxes would be charged too much.

The extent of payment for fire service cannot be based upon the amount of water supplied, nor should it be charged at so much per hydrant installed. The cost of fire service will be more evenly distributed if the respondent is permitted to make a specific annual charge for each mile of main four inches or over that is used wholly or in part for fire service and in addition thereto make an annual charge for each hydrant. The cost per hydrant and per mile of main may vary in different localities depending upon the extent of each. Viewing the service rendered by the respondent to the borough as well as to its domestic consumers, the Commission has determined that the borough should pay annually to respondent for its present fire service approximately the sum of \$4,500.

DISTRIBUTION OF REVENUE.

From the conclusions we have herein reached respondent should, within thirty days from the filing of the order in this case, through a proper schedule of rates, prepared by it, and filed with the Commission provide such a schedule that will produce total revenue amounting to \$30,708.11, as compared with \$41,202, in 1916, and \$41,367.18, in 1917, and \$41,910.07, in 1918, the said sum to be so raised to be distributed in said schedule as follows:

From the Penn'a R. R. Co., approximately ..	\$8,685 28
Fire service to borough	4,500 00
From all other sources	17,522 83
Total	<u>\$30,708 11</u>

The complaint made in this case is sustained and an order will issue in compliance with the findings herein made.

Commissioner Rilling dissents.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, February 17, 1919, the *Spring Water Company* is ordered and directed, within thirty (30) days from the date of this order, to file and publish a schedule of rates, which shall be calculated to produce an annual revenue of \$30,708, the said revenue to be distributed in said schedule as follows: from the Pennsylvania Railroad Company, \$8,685; from fire protection service to the borough, \$4,500; from all other sources, \$17,523; said schedule to become effective on or before April 1, 1919, upon one day's notice to the public and this Commission; and the said Spring Water Company is further ordered, within one year, to purchase from the Borough of Kane the fire hydrants now owned by said borough and used by the water company in rendering its fire protection service.

By the Commission,
WM. D. B. AINEY, *Chairman*.

BOROUGH OF NEWVILLE *v.* NEWVILLE WATER COMPANY.

Rates—Water companies—Fire protection—Municipal contract.

The rates for fire protection to the complainant were increased from \$275 to \$875 per year. It was contended that the new rates were not only unreasonable and excessive, but in violation of a contract between the parties.

The Commission held that the contract did not prevent the fixing of a just and reasonable rate. Upon evidence submitted the rate for fire protection was fixed at \$600 per year, effective Feb. 1, 1919. Jurisdiction of the case was retained for the purpose of determining what damages, if any, were suffered by the complainant.

COMPLAINT DOCKET No. 1800.

Report and Order of the Commission.

Caleb S. Brinton and Willis K. Glauser, for complainant.

W. H. McCrea and E. M. Biddle, Jr., for respondent.

ALCORN, Commissioner:

The Newville Water Company filed an amended tariff November 14, 1917, effective January 1, 1917, providing for a charge of approximately \$875 per annum to the Borough of Newville for fire protection service. This is the first tariff filed by the respondent covering the rates for fire protection. The previous rate was \$275 per annum in accordance with a contract dated December 12, 1907, expiring July 1, 1916.

In its complaint the Borough of Newville alleges that the tariff is illegal because it is made effective January 1, 1917; that the respondent has failed to post and file the said tariff as provided by law; that the new tariff is unjust and discriminatory in that it proposes to advance the municipal rates for fire hydrants and does not advance the rates to individual, commercial and industrial consumers; that the ordinance of January 1, 1895, granting a franchise to the respondent provided that the rates to be charged the borough should be fixed by a contract between it and the respondent and that the new rate has not been agreed to by the complainant and that the respondent has no right to advance the said rates without the consent of the borough.

The respondent was incorporated January 8, 1896, for the purpose of supplying water to the Borough of Newville. It has a capital of \$20,000 and a bonded indebtedness of \$20,000 at 5%. The population of Newville is about 1,500. There are twenty-five fire hydrants and 239 consumers.

The material matter for determination is whether the proposed rate of \$250 per annum per mile of main 4" and larger, and \$10 per annum for each fire hydrant is just and reasonable. The other parts of the complaint need very little consideration. The retroactive effect of the tariff will not be material in view of the order of the Commission which will be made in this case.

As to posting, the respondent has complied with the act of assembly. A copy of the tariff was served upon the borough on November 30, 1917. The tariff was posted in the power house and in the office of the superintendent. The water company did not have any separate office. The borough had actual knowledge of the proposed tariff and knew what the increase was.

If the rate which the borough is required to pay is a just and reasonable rate there is no unjust or undue discrimination against it in any rate which the water company may establish for domestic, commercial or industrial consumption.

It is settled that an ordinance granting a franchise which purports to regulate rates to be charged by a public service company does not preclude the Commission from determining what is a just and reasonable rate. The vital and important question for the determination of the Commission is the rate that should be charged for fire protection. There was evidence submitted to show that the service rendered for fire purposes was limited and the borough was required to purchase a fire engine in order to provide better protection.

In pursuance of an agreement of the parties a conference of engineers was held, the complainant, the respondent and the Commission being represented. After several meetings they agreed upon the various items of reproduction cost new and the operating expenses and annual depreciation. They agreed upon a reproduction cost new of \$32,614, to which may be added for organization and administration during construction \$956, for loss of interest during operation \$1,969, making a total reproduction value new of \$35,539.

The following table shows the reproduction cost new less depreciation, including the two items before mentioned as to which an agreement was reached by the engineers for the parties in interest.

It was agreed that the operating expenses are \$956, and depreciation allowance \$415.

From the evidence submitted and considering the reproduction cost new, less depreciation, and of all other elements of value pertinent, the Commission finds the fair value of respondent's property is \$28,000, and allowing the company 7% thereon annually, \$1,960, the revenue the company should receive is \$3,331.

**REPRODUCTION ESTIMATE AND DEPRECIATION TABLE PROPERTY OF THE
NEWVILLE WATER COMPANY, APRIL 7th AND 8th, 1918.**

ITEM.	Age.	Life.	Reproduction Value.	Annual Depreciation.	Accrued Depreciation.	Present Value.
1. Real Estate .....	.....	.....	\$2,400 00	.....	.....	\$2,400 00
2. Water Rights .....	.....	.....	500 00	.....	.....	500 00
3. Intake	21	80	140 00	\$4 67	\$93 07	41 98
4. 8" Line	21	85	1,220 00	14 85	\$91 85	915 65
5. Pipe Lines:						
1" - 152' @ 30c	21	85	13,501 00	158 83	2,325 43	10,165 57
4" - 7100' @ 30c						
6" - 2450' @ \$1.04						
8" - 3950' @ \$1.33						
6. Specials:						
9400 @ 34c	21	85	252 00	2 96	68 16	189 84
7. Valves:						
7" - 8 @ \$30	21	50	580 00	11 20	225 20	354 80
6" - 5 @ \$23						
4" - 14 @ \$15						
8. Fire Hydrants, 25 Mallets, @ \$45	21	50	1,125 00	22 50	473 50	652 50
9. Reservoir	21	75	2,050 00	36 33	741 98	1,908 07
10. Meters	15	25	78 00	3 88	43 30	28 80
11. Turbine	21	35	650 00	18 57	339 97	290 08
12. Pump Gear and Shafting	21	35	850 00	24 30	510 30	329 70
13. Building	21	60	1,100 00	18 33	394 93	715 07
14. Forebay	5	75	750 00	10 00	50 00	700 00
15. Dam	11	75	2,400 00	32 00	352 00	2,048 00
16. Tools and Supplies	51	15	230 00	7 33	35 65	183 35
17. Books .....	.....	.....	30 00	.....	.....	.....
Total .....	.....	.....	\$28,420 00	\$363 25	\$7,018 69	\$21,406 31
Less Items 1, 2, 16, 17 .....	.....	.....	2,150 00	.....	.....	.....
Total	19.6	71	\$25,270 00	\$355 92	\$9,377 04	\$15,238 95
Contingencies, 5 per cent. ....	.....	.....	1,264 00	17 80	848 88	915 12
Total	19.6	71	\$26,534 00	\$373 72	\$7,325 92	\$19,208 08
Engineering	19.6	71	1,500 00	21 13	414 15	1,085 85
Real Estate and Water Rent .....	.....	.....	2,900 00	.....	.....	2,900 00
Tools and Supplies and Books .....	.....	.....	250 00	7 33	35 65	213 35
Working capital .....	.....	.....	500 00	.....	.....	500 00
Interest during Construction	19.6	71	980 00	13 10	256 76	673 24
Total .....	.....	.....	\$33,614 00	\$415 23	\$9,083 48	\$24,530 52
Organization and Administration	21	71	958 00	.....	.....	958 00
Loss Interest during Operation	19.6	71	1,939 00	.....	.....	1,939 00
Total, .....	.....	.....	\$35,593 00	\$415 23	\$9,083 48	\$27,505 29

The conference reported to the Commission three methods of determining how much of this revenue should be allotted to fire purposes. It is only necessary for us to refer to two of them, as the remaining one is not considered applicable in this case. The two which we will consider are the "Excess Method" and the "Relative Demand Method B." The conference report so desig-

nates them. By the excess method there is allotted to fire protection \$327 per annum, and the other method will require \$1,045. The excess method should not be adopted in the present case, as the return is too small and does not charge a proper sum for fire purposes. The relative demand method produces an amount which under the circumstances seems excessive.

Having in mind that the service, owing to the low pressure and limited facilities of the respondent, is not the best, the Commission is of the opinion that the sum of \$600 per annum would be a just and reasonable charge and the respondent is ordered to withdraw the present tariff so far as it relates to fire hydrants and to file a new tariff providing for a rate that will return not over \$600 per annum, the said tariff to become effective as of February 1, 1919, on less than statutory notice to the public and the Commission. Jurisdiction of this complaint will be retained by the Commission for the purpose of determining the amount of damages, if any, sustained by the complainant by reason of the collection of charges for fire service under the rates found by the Commission to be unjust and unreasonable as a basis for an order of reparation. An order will be made accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, January 7, 1919, the complaint, so far as it relates to service for fire purposes, is sustained; and

It is ordered: That the respondent, the Newville Water Company, withdraw its schedule or tariff of rates so far as the same relates to service for fire purposes, which said rates are hereby found to be unjust and unreasonable, and shall file a new or amended tariff within ten days from the date of the service of this order, effective February 1, 1919, on less than statutory notice to the public and this Commission providing for a rate that will return not over six hundred (\$600.00) dollars per annum for service for fire purposes, which is hereby determined to be the just and reasonable rate; and

It is further ordered: That jurisdiction of this complaint be retained by the Commission for the purpose of determining the amount of damages, if any, which the complainant has sustained by reason of the collection of charges for service for fire purposes under the rates found by the Commission to be unjust and unreasonable, as a basis for an order of reparation.

REVISED ORDER.

It appearing to the Commission that part of its order in this case issued January 7, 1919, was based upon a misapprehension of the facts and should be revoked; and it further appearing that the complainant borough has paid nothing to the respondent for its service for fire purposes since July 1, 1916:

Now, to wit, February 4, 1919, it is ordered: That the portion of the order issued January 7, 1919, which reads as follows: "It is further ordered, that jurisdiction of this complaint be retained by the Commission for the purpose of determining the amount of damage, if any, which the complainant has sustained by reason of the collection of charges for service for fire purposes under the rates found by the Commission to be unjust and unreasonable, as a basis for reparation," be and the same is hereby revoked and the record closed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

NATIONAL TUBE COMPANY *v.* PENNSYLVANIA RAILROAD CO., ET AL.

CARNEGIE STEEL COMPANY *v.* PENNSYLVANIA RAILROAD CO., ET AL.

AMERICAN STEEL & WIRE COMPANY *v.* PENNSYLVANIA RAILROAD CO., ET AL.

Intervenors: ST. CLAIR TERMINAL R. R., ETNA & MONTROSE R. R., PGH. & OHIO VALLEY R. R., MERCER VALLEY R. R., MC-KEESPORT CONNECTING R. R., NORTHERN LIBERTIES RWY. CO., DONORA SOUTHERN R. R.

*Rates—Tariff changes resulting in increase of—Terminal service
—Placement of cars.*

Schedules providing for payment to industrial railroads of certain amounts for terminal services may not be cancelled in the absence of proof that such allowances are excessive, or that the transportation rate which included said allowances is inadequate. To do so without making a corresponding reduction in the initial rate would result in an increased charge for the service rendered.

The placement of cars by an industrial railroad, performed in connection with an intrastate road haul, is a terminal service for which said industrial railroad is entitled to a reasonable allowance, and the fact that said service is performed for its proprietary industry does not alter the rule.

The complainants being entitled to the placement of cars as part of the transportation service, the incorporated railroads must be employed for that purpose and a reasonable allowance must be made therefor. Unincorporated roads employed for the same purpose are entitled to a corresponding compensation.

COMPLAINT DOCKET NOS. 193-3, 193-4, AND 193-5.

Report and Order of the Commission.

George C. Wilson and *W. D. Evans*, for Monongahela Connecting R. R. Co. and Jones & Laughlin Steel Co.

Charles MacVeagh, *Jas. H. Reed*, *C. A. Severance*, and *C. S. Belsterling*, for Carnegie Steel Co., Natl. Tube Co., Am. Steel & Wire Co., Union R. R. and Portland Cement Co.

J. Roy Dickie, for C. G. Hussie & Co.

H. A. Moore, for Bethlehem Steel Co.

Frederic W. Fleitz (deceased), for D., L. & W. R. R. Co.

William B. Linn, for B. & O. R. R. Co.

R. W. Barnett, for Lehigh Valley R. R. Co.

Ernest S. Ballard, for N. Y. C. & Hudson R. R. R. Co., Pgh. & L. E. R. R. Co. and Lake Shore & Mich. Southern R. R. Co.

William L. Kinter, for P. & R. Rwy. Co.

Henry Wolfe Bikle, for P. R. R. Co.

Andrew R. Sheriff, for Pgh., Allegheny & McKees Rocks R. R. Co. and South Shore R. R. Co.

Snodgrass & Smith, for Kittanning Run R. R. Co.

T. H. Burgess, for Erie R. R. Co.

Irving S. Olds, for Northampton & Bath R. R. Co., et al.

George E. Alter, for numerous industrial interests.

AINEY, Chairman:

There are three complaints now before us, all relating to the withdrawal, by respondents, of rate allowances to industrial railways for deliveries to their proprietary industries, which, because of the similarity of conditions presented, were heard together and may be disposed of in this report.

The National Tube Company, complainant in No. 193-3, is engaged in the manufacture of wrought iron pipe, with four plants located in McKeesport, on the McKeesport Connecting Railroad, and two plants located in Pittsburgh, on the Monongahela Connecting Railroad. Its complaint is directed against the Baltimore & Ohio Railroad Company, the Pennsylvania Railroad Company, and the Pittsburgh & Lake Erie Railroad Company.

The Carnegie Steel Company, complainant in No. 193-4, is engaged in the manufacture of steel products, with plants located at Munhall, Homestead, Rankin, South Duquesne, and Bessemer, on the Union Railroad; at Clarion, on the St. Clair Terminal Railroad; at Etna, on the Etna & Montrose Railroad; at Pittsburgh, formerly Allegheny, on the Allegheny Division of the Pittsburgh & Ohio Valley Railway; at Neville Island, on the Neville Island Division of the Pittsburgh & Ohio Railroad; at Pittsburgh, on its own Lucy Furnace tracks, connecting with the B. & A. V. Division of the Pennsylvania Railroad; at Farrell, on the Mercer Valley Railroad, and at Sharon, on the lines of the Pennsylvania Company, the Lake Shore & Michigan Southern Railroad Company, and Erie Railroad Company. Its complaint is directed against the Pennsylvania Railroad Company, Pittsburgh & Lake Erie Railroad Company, Baltimore & Ohio Railroad Company, Pennsylvania Company, Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, Lake Shore & Michigan Southern Railway Company, Erie Railroad Company.

The American Steel & Wire Company, complainant in No. 193-5, is engaged in the manufacture of steel products, and has two plants, one located at Pittsburgh, on the Northern Liberties Railway Company, and the other at Donora, on the Donora South-

ern Railroad Company. It complains against the Pennsylvania Railroad Company, Baltimore & Ohio Railroad Company, Pennsylvania Company, Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company.

Each of these complaints charges that the respondents, designated herein trunk line railroads, by the cancellation of tariffs providing for allowances for certain terminal services which were performed by the Union Railroad Company, the St. Clair Terminal Railroad Company, the Etna & Montrose Railroad Company, the Pittsburgh & Ohio Valley Railroad Company, the Mercer Valley Railroad Company, the McKeesport Connecting Railroad, the Monongahela Connecting Railroad, the Northern Liberties Railway Company, the Donora Southern Railroad Company, herein designated the industrial railways, and for certain terminal and switching services performed by the Carnegie Steel Company, complainant, at its Lucy Furnaces in Pittsburgh, at the North Sharon Steel Works and furnaces in Sharon, have imposed the expense of these terminal services upon the complainants.

The complainants allege that the effect of these cancellations is to increase the rates to complainants for the same service. The complainants further allege that such increases are unjust and unreasonable and unduly discriminatory. Another ground of complaint is that the trunk line railroads have, without the filing of any tariff, issued orders that on and after a designated date demurrage will be charged for detention of cars from the time they are placed upon the interchange tracks of the industrial railways until they are returned to the respondent line carriers. It is alleged that this will result in an unjust and unlawful discrimination in favor of other shippers and receivers of like and other commodities in the Pittsburgh and Shenango District.

The answers of the respondents are in direct denial that the rates on commodities received at and shipped from complainants plants have been unreasonably or unjustly advanced, or that the rates which will be in force, following the cancellation of the tariff, will be unjust and unreasonable or unduly discriminatory, or that thereby the complainants or their traffic will be subjected to any undue prejudice or disadvantage. The complaints were filed prior to the effective date, and, under the Public Service

Company Law, the burden of proof rests upon respondents to justify the proposed increased rates.

Upon their petitions, the Commission permitted the St. Clair Terminal Railroad Company, the Etna & Montrose Railroad Company, the Pittsburgh & Ohio Valley Railroad Company, the Mercer Valley Railroad Company, the McKeesport Connecting Railroad Company, the Northern Liberties Railway Company and the Donora Southern Railroad Company to intervene. Strictly speaking, the issue presents a single and simple question for determination. Have respondents met the statutory burden of proof, justifying the increased rates caused by the cancellation of their tariffs, making certain allowances for services performed by the industrial railways, in the placing and picking up of cars at or from the customary points for loading and unloading within the plant limits of the complaining industries?

The tariffs of the trunk line carriers prescribe rates covering the entire transportation service of haulage and delivery to the industries. In fixing these rates the services performed by the industrial railways were included. By withdrawing these allowances to the industrial railways, the complainants are required to bear an additional charge, and if the trunk lines make no corresponding reduction, an increase in rates results.

Inasmuch as no evidence was offered to show that these allowances were too much for the services performed by the industrial railways, or that the transportation rates out of which the allowances were paid were too low, the respondents have not met the burden of proof imposed upon them by our statute, and the cancellation of the allowance tariff cannot stand.

This was our conclusion in the Monongahela Connecting Railroad Company and the Union Railroad Company cases, under very similar circumstances: 1 Pa. P. S. C. Decisions 46, 1 P. C. R. 183, wherein we were constrained, in the light of the decision of the Supreme Court of Pennsylvania, *Crane Railroad Company v. Central Railroad Company of New Jersey*, 248 Pa. 333, to differ with Interstate Commerce Commission's opinion expressed with respect to these two railroads in *Industrial Railways Case*, 29 I. C. C. 212.

We may now follow our former opinion with greater confidence for since its deliverance, and the conclusion of testimony in these

cases, the U. S. Supreme Court in the Tap Line Cases, 234 U. S. 1, has established the legal status of incorporated industrial railways and their right to receive from connecting trunk lines allowances out of rates for similar services rendered by them in making delivery of cars to their proprietary companies.

The Interstate Commerce Commission later said it could not distinguish in principle the decision in the Tap Line Cases from the Industrial Railway Cases, and therefore modified its former findings. Industrial Railway Cases, 32 I. C. C. 129.

The situation which confronted complainants, respondents, and this Commission during the initial and developmental stages of the instant cases, both with respect to proper administrative policy and substantive law applicable to them, has materially changed.

No doubt the trunk line carriers were led to cancel their allowance tariffs because of the Interstate Commerce Commission's views expressed in Industrial Railway Cases, 29 I. C. C. 212, *supra*, but the later decisions of that Commission, as well as the deliverances of the State and U. S. Appellate Courts, have removed us from the pale of its reasoning and the scope of its authority.

Having determined that there is no evidence in this record with respect to the reasonableness of the increased rates, we are therefore bound under the law and the precedents, Monongahela Connecting Railroad Company, *supra*, and Baltimore Switching Case, 30 I. C. C. 581, to hold that the respondents have failed to justify the increases proposed.

This will dispose of the rate question at least until such time as evidence is presented, justifying a change; there are however several questions concerning the character of the services performed by these incorporated industrial railways, and by the Carnegie Steel Company through its own unincorporated railroad which for the future guidance of parties concerned should be answered.

Among the propositions advanced by the respondents were:

First: That services, such as were performed by industrial railways and for which they were receiving allowances from the trunk line carriers, were plant services and not transportation services.

Second: Even if the services might be considered transportation services they ceased to be such when performed by the industrial railways for their proprietary industry.

The common law rule concerning delivery to complete the transportation service has from time to time undergone modifications predicated in part upon requirements of consignees and in part upon the means employed for common carriage. In the days of stage coaches and horse-drawn vehicles engaged in public transportation personal delivery was required. It is obvious that railroads could not be held to make such deliveries, and delivery at freight stations and at designated public sidings were held to complete the transportation service. With the industrial development of the country private sidings were installed and the duty of common carriage broadened so as to require cars to be placed thereon, clearing the main tracks. Then warehouses, stores and factories were constructed adjacent to these private sidings, and "spotting" cars at customary points of loading or unloading became a part of the carriers delivery obligation. *Industrial Railway Cases*, 29 I. C. C. 212 (226); *Los Angeles Jobbers Case*, 18 I. C. C. 310 (316); *Buffalo Furnace Company*, 21 I. C. C. 620 (627). As a means of accomplishing the terminal service in large industrial plants extended mileage of tracks was required, frequently beyond the ability of the railroads to furnish. These tracks are usually located within the plant confines and so constructed as to enable the expeditious placing of cars at the different points therein where loading or unloading is to be done. In most instances these plant railroads were constructed and operated by the industries themselves, but later many of them, particularly in the Pittsburgh and Shenango districts now under consideration, were incorporated under the general railroad law of the Commonwealth. In practice they receive the cars from the trunk lines at the interchange tracks, classify them in their own yards, according to the materials with which they are loaded, and place them at the customary points of loading or unloading within the plants.

For this service, and similar services, these industrial railways, for many years, received from the trunk lines, out of the latter's rates, the allowances prescribed in the trunk line carriers tariffs. The complainants and the intervenors maintain this to be a transportation service, completing the delivery following the line haul, while the trunk lines insist that the delivery is complete when cars are placed by them on the interchange tracks of the industrial railway, and that the service performed by the latter companies

for these proprietary companies is a plant service for which no allowance can be made without subjecting them to the charge of unlawful rebating or discriminatory practices.

The trunk line carriers cancelled their allowance tariffs to industrial railways, following the opinion in *Industrial Railway Cases*, 29 I. C. C. 212, but, as heretofore noted, that opinion has been greatly modified by the distinguished body which announced it, and there have been new lines of demarcation established by the court, so that what were formerly considered administrative questions have now been transferred to the body of settled and substantive law.

The development of the expressions of the law since these complaints were filed, is evidenced by the following excerpts from decisions:

"All the service by the line carriers beyond a reasonably convenient point of interchange between the rails of the carrier and the rails of the industry, either within or without the plant, is a shipper's service and not a service of transportation which the line carrier may perform without charge or may allow for out of the rate through divisions or otherwise when performed by the industry or by its industrial railroad, and that the facilities used by the industry in performing the service, whether separately incorporated or not, are plant facilities and plant equipment. We also conclude and find that the delivery of a car by a line carrier upon the exchange track is a delivery to the industry, and that the elimination of demurrage, under the present practices, as a transportation charge against the industry is unlawful and gives the industry so favored an undue and unreasonable preference and advantage. We further find and conclude that undue and unlawful preferences and discriminations arise out of the present practice of the line carriers in performing such services without additional charge and in making allowances therefor out of the rate when performed by the industry or by its plant railway." *Industrial Railways Cases*, 29 I. C. C. 212 (237).

Following the *Tap Line Cases*, *supra*, this opinion was modified:

"We think that in the light of the decision of the Supreme Court in the 'Tap Line Cases' it is our duty to so modify our findings in the original report herein as to permit the trunk line roads, if they so elect, to arrange by agreement with any of the industrial roads mentioned in our former report which are common carriers under the test applied by the Supreme Court in the 'Tap Line Cases,' and which perform a service of transportation, for a reasonable compensation for such service in the form of switching charges or divisions of joint through rates." Industrial Railways Cases, 32 I. C. C. 129 (132).

In the Birmingham Southern Railroad Case, 32 I. C. C. 110, it was held that the service between the trunk line interchange and the interior of the plant is a service of transportation and a part of the through haul.

In the Atchison, Topeka & Santa Fe Railway Company v. Kansas City Stock Yards Case, 33 I. C. C. 92 (98), another feature of the situation was recognized by the Interstate Commerce Commission where it was held:

"Railroads are not required to own all of the instrumentalities required for the performance of the service which they are bound or undertake to perform. They may also lease or hire suitable facilities or discharge a part of their duties through agents and without restriction as to the public or private status of such agents or of the owners of the instrumentalities procured. The only restriction is that contained in Section 15 of the act to the effect that allowances to shippers for furnishing transportation or instrumentalities thereof shall be supervised by the Commission."

In the Chicago Switching Case, 34 I. C. C. 234 (239), the carriers used a system of tunnels carrying narrow gauge tracks under the streets of Chicago to make delivery to the underground shipping rooms of consignees. This service was included in the through rates, and upon the attempt of the carriers to cancel this supplemental service the Interstate Commerce Commission said:

"No good reason appears for placing the industries and shippers who are served by and dependent upon the tunnel and lighterage companies at a disadvantage as compared with other shippers and consignees in the Chicago district, which, by coöperative action of the carriers and for commercial, industrial and competitive reasons has become, and been maintained as, a common rate district or community." * * *

"The justification for cancellation of through rates with the tunnel and lighterage companies consists mainly in the declaration that the line haul carriers are within their rights in taking such action because the service rendered by the tunnel and lighterage companies is a service beyond the rails of the line haul carriers, for which they have a legal right to insist upon an additional charge. They show the amounts paid to the tunnel and lighterage companies out of the through rates, but they fail to present any evidence to show that the increased charges to those who use or are dependent upon the tunnel or lighterage company would be reasonable, and practically ignore the question of unjust discrimination against shippers and consignees which would thereby be created."

The Mitchell Coal Company Case, 230 U. S. 247 (263), recognized the predominating characteristics of the switching district as including the common delivery and shipping points, and held that the rates running to that district included a delivery to any point of that district which is accessible by rail. Justice LAMAR, who wrote the opinion, said:

"But neither the statute nor the tariff defines what are station limits, nor do they fix the exact point from which the transportation must begin, nor the territory within which the delivery must be made. These limits necessarily vary with the size of the communities, the extent of the yards, the practice of the carrier, and the bounds within which it uniformly receives and delivers freight. This is particularly true in a case like the present, where the Clearfield district was treated as a single shipping point, and where the rate, though named and published as from the station, was universally applied from the mines of the Mitchell Company as well as the other companies named in the declaration and all others located in the Clearfield district."

"Inasmuch as this rate included the haul, the railroad was bound to transport the coal from the mouth of the mines, and could use its own engines for that purpose or it could employ the coal companies to render that service, paying them proper compensation therefor."

In the Second Industrial Railway Case, 34 I. C. C. 596, it was recognized that the industrial railway adjacent to a plant is a legitimate factor of transportation in and out of the plant.

The Car Spotting Case, 34 I. C. C. 609, goes much further and holds in effect that the contract of transportation begins where the car is loaded and ends where the car is destined to be unloaded, no matter where these points may be, whether in or out of the plant. The size of the plant, the complexity of the industrial tracks is no objection or hindrance to the operation of the principle; placing the burden on the carrier in extraordinary cases of establishing a satisfactory reason for noncompliance.

The complainants' testimony that the service tendered by the terminal lines is identical with that rendered by the trunk lines to other industries in the same territory without any charge, in addition to the line haul rate, was not controverted, and it was further established that complainants plants are located in a territory from and to which rates are made up by the group or zone system. The Pittsburgh rate group extends over a territory of approximately 6,058 square miles, and the propriety of this grouping was not questioned, and is apparently justified under Article III, Sec. 9 (a), of the Public Service Company Law. *Valley Smokeless Coal Company v. Pennsylvania Railroad Company*, 4 P. C. R. 611.

The American rule of rate making includes in the freight rate two terminal services, one initial and one final, in addition to the road haul, and based upon the application of this rule, shorter hauls pay a larger rate proportionately to mileage than do the longer hauls. Thus terminal expenses are equitably apportioned. The rule is sufficiently stated in the *Car Spotting Charges*, 34 I. C. C. 609 (616):

"It has long been the custom of carriers in this country to receive and deliver carload freight upon spur tracks leading to private industries at convenient points for loading and unloading without imposing any charge for that service in addition to the line haul rate, and in the *Los Angeles Case*, 18 I. C. C. 310, we held that where this service is merely a substitute for team-track receipt and delivery of carload freight the line-haul rate covers the service for the reason that rates generally in this country have been constructed upon that basis. Our order in that case was upheld by the Supreme Court. *Los Angeles Case*, 234 U. S. 294. The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or de-

livery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries. At the large industries the trunk line may render interplant services in the movement of cars from place to place within the plant during the processes of manufacture which it has no occasion to render at smaller industries, and for such services an additional charge should be made; but where the service rendered is merely a substitute for the service which would be required if the movement were to or from a team track, an industry spur, or a private siding, nothing should be added to the charge for the line haul."

"As existing rates may be deemed to have been constructed to cover the customary placement of cars at factory doors, whether upon an industry spur or private siding, or upon the tracks of an industrial plant, and the outward movement of cars from such tracks, without regard to the size or nature of the plant to now add a charge to the line-haul rate for that service would be revolutionary." * * *

(619) "The argument that while the line-haul rate may cover the movement incident to the receipt and delivery of carload freight when that movement is over an ordinary industry spur it does not cover a like service when the movement is over the interior tracks of an industrial plant is founded upon the assumption that the carrier and the industry have the joint use of the industry spur while the interior tracks of the industrial plant are used exclusively by the industry. The fact is, however, that the service which the carrier renders in the movement of cars over the interior tracks of the industrial plant for the purpose of receiving and delivering carload freight of the industry is a public service, and the tracks are used both for that public service and for the private purposes of the industry. It is immaterial that the carrier may not use the tracks for all the purposes for which it uses the ordinary industry spur. The difference is merely one of degree and not of kind."

The fundamental principle of American rate making is that the freight rate should cover the entire carriage of taking the goods up, transporting them to their destination, and setting them down. *Union Trust Company v. Atchison, T. & S. F. R. R. Company*, 64 Fed. Rep. 992 (994) :

"The freight demanded covers the entire service of the carrier from depot to depot. It is in law the compensation, not only for the actual carriage, but also for the facilities furnished for loading and unloading. The service is a single one, and the compensation is likewise single. The law will not permit the charge for such single service to be divided. A carrier cannot make up its bill of charges in items—one for loading, one for carriage, one for personal service of attendants, one for delivery, etc. The freight is not an aggregate of separate charges, but a single charge. This policy of the law is not because a particular shipper might not deal with the carrier as intelligently in the case of one method as in the other, but because the public is not so likely to deal intelligently with a series of items as with a single freight rate. The shipper may be intelligent or unintelligent, ignorant or educated, accustomed to business, or inexperienced in such affairs deliberate and careful, or hasty and uninquiring. The service of the carrier is for one as well as the other. A single charge presents to him at once the whole problem. A series of charges might confuse him, and leave uncertain what, in the end, the aggregate would be."

See also *Covington Stock Yard Case*, 226 U. S. 286. In the *Minnesota Rate Case*, 230 U. S. 352 (384), Justice HUGHES said :

"Every rate comprehends two terminal charges, the initial and the final, and a haulage charge. It is declared to be a cardinal principle of rate making that a rate for a longer distance should be proportionately smaller than one for a shorter distance; for even if the haulage charge in the former case were the same per mile, the rate per ton mile should be less for the longer haul, as the terminal charges would be spread over a greater distance."

And the presumption is that the imposed rate for carriage includes adequate compensation for terminal services. *Interstate Commerce Commission v. C. B. & Q.*, 186 U. S. 320 (326).

The English decisions afford very little assistance for there, under the English Railway and Canal Traffic Act, the road haul and the terminal services are subject to separately imposed rates. *Los Angeles Jobbers Case*, 18 I. C. C. 310.

From these cases it would appear that in the absence of evidence of unusual circumstances making them exceptions to the rule, the complainants are entitled, as a part of the carriers duty of common carriage, to have their carload shipments delivered at the customary points for loading or unloading in their plants and without any expense to them other than as included in the line-haul rates, a delivery similar to that on private sidings of other industries in the same territory.

This duty of delivery resting upon the carrier, he is not bound to perform the service with his own power "and there is nothing to prevent his hiring the instrumentality instead of owning it." *Sugar Lighterage Case*, 231 U. S. 274 (58 Law Ed. 218); *Kansas City Stock Yard Case*, 33 I. C. C. 92.

"Manifestly it is unfair that some shippers should perform the service of spotting cars at their own expense while many of their competitors in the same industrial district have this service performed by and at the expense of the carriers. The line-haul service of course varies as to shipments transported by different lines for the same shipper and by the same line for different shippers, although all may pay the same rate; but for this service it is impracticable to grade rates with such nicety as to make them absolutely dependent upon every slight variation in the measure of service rendered. The service of handling traffic from the line-haul carriers' interchange tracks to the points of placement on the private industry tracks within the shippers' plants, at times and in the quantities to suit the convenience of shippers is, however, distinctly different in character from the line-haul service. Obviously it is discriminatory for the carriers to place ore shipments for some shippers on private tracks within their plants at the points of unloading while other shippers are served only at the gates of their plants, or at the point of interchange with the industry tracks." *Iron Ore Rate Case*, 41 I. C. C. 181 (200).

There is little doubt that the operation of these industrial railways promotes efficiency and economy. Power under one control is admittedly desirable, and particularly where there is more than one trunk line connection, and permits the placement of cars for loading and unloading at the times when that work can be most expeditiously and advantageously accomplished. In some instances the inter-mill work is performed by the industrial railway, and some of the more modern plants have been designed with a view to having these services performed by the power of the industry (or industrial railway) and not by the power of the railroad company.

That the terminal service can be performed by the terminal lines at much less cost than if rendered by the trunk lines themselves is established. The service in placing cars for the iron and steel industry is not so arduous or complicated as in other industries, as large sums have been invested by them in providing adequate terminal facilities, an expense of which the trunk lines have been relieved, and a service for the performance of which they are not equipped. *Car Spotting Case*, 34 I. C. C. 609 (615).

For perhaps twenty years in the Pittsburgh and Shenango district, these or similar allowances have been treated as covered by the line-haul rate, and an additional charge to the complainants for the service covered by these allowances is not proper. *Car Spotting Case*, 34 I. C. C. 609 (616).

Section 1 (e), Article III, of the Public Service Company Act, provides:

"Whenever any owner of property transported by any common carrier, or any user or patron of any other public service company, renders, directly or indirectly, any service connected with such transportation or other public service, the charge and allowance therefore shall be no more than is just and reasonable; and the Commission may, after hearing, on its own motion or upon complaint, determine what is a reasonable charge, as a maximum, to be paid by the carrier or other public service company for the use of the service so furnished or rendered, and what is a proper proportion of the said cost, and fix the same by appropriate order, to be observed and enforced by the parties concerned."

Predicated upon this section which is substantially similar to a provision in the Interstate Commerce Act, the complainants maintain that the rights of the owner to demand and receive reasonable compensation for services rendered in connection with the transportation is established.

Justice HOLMES in the Grain Elevator Cases, 222 U. S. 42 (46), in affirming the judgment of the Circuit Court, 176 Fed. Rep. 409 (which see), held:

"The law does not attempt to equalize fortune, opportunities or abilities. On the contrary, the act of congress in terms contemplates that if the carrier receives services from an owner of property transported, or uses instrumentalities furnished by the latter he shall pay for them. That is taken for granted in Section 15; the only restriction being, that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint (or, now, upon its own motion: Act of June 18, 1910, c. 309, 12, 36 Stat. at L. 539, 553). As the carrier is required to furnish this part of the transportation upon request he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it. In this case there is no complaint that the rate out of which the allowance is made is unreasonable and it is admitted that three-quarters of a cent barely would pay the cost of the service rendered without any reasonable profit to Peavey & Co. for the work. See *I. C. C. v. Stickney*, 215 U. S. 98."

And a carrier has a right under the act to regulate commerce to pay shippers a reasonable allowance for services in connection with the transportation of goods shipped by them. *Mitchell Coal Case*, 230 U. S. 247. To the same effect is *Sugar Lighterage Case*.

"Upon the other hand, if the lighterage of the Arbuckle sugar was included in the through rate from the Jay street station, and a part of the transportation which the railroads were under obligation to perform, and that lighterage was done by Arbuckle Brothers at the instance and procurement of the carriers, they, as owners of the freight thus transported, were entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed." *Sugar Lighterage Case*, 231 U. S. 274 (292).

The record in this proceedings shows that the expense of the terminal transportation service such as performed by the intervenors' railroads, to wit, the classification of the cars with respect to destinations of consignees and the switching of cars to and from points of loading and unloading on the spur tracks of the industries, is included in the through rates to and from the Pittsburgh and Mahoning and Shenango Valley districts, and is a part of the transportation which the respondent railroads are under obligations to perform, and that such terminal transportation service is done by intervenors' railroads at the instance and procurement of the carriers; and in such circumstances, under the authorities cited, the owner of the freight thus transported is entitled to demand a compensation reasonably commensurate with the facilities furnished and the services performed, where the services and facilities are performed by an unincorporated railroad, such as the Lucy Furnace Railroad of the Carnegie Steel Company. Such allowances are not purely permissive as counsel for defendants contends, but mandatory where the owner of the property furnishes facilities, in connection with transportation.

The argument that a service by an industrial railway which is a transportation service when performed for a nonproprietary industry becomes a plant service when performed for its proprietary company, is not convincing, and in any event falls in the light of the decision in Tap Line Case, 234 U. S. 1 (28), where it was held:

"As we have said, the Commission by its order herein required the trunk lines to reestablish through routes and joint rates as to property to be transported by others than the proprietary owners over the tap lines. This order would of itself create a discrimination against proprietary owners, for lumber products are carried from this territory upon blanket rates applicable to all within its limits. It follows that independent owners would get this blanket rate for the entire haul of their products while proprietary owners would pay the same rate plus the cost of getting to the trunk line over the tap line. The Commission, by the effect of its order, recognizes that railroads organized and operated as these tap lines are, if owned by others than those who own the timber and mills, would be entitled to be treated as common

carriers and to participate in joint rates with other carriers. We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves." See also Los Angeles Switching Case, 234 U. S. 294.

The decision of the Interstate Commerce Commission in the Lorain case (National Tube Company v. Baltimore & Ohio Railroad Company, 50 I. C. C. 485) affords us very little assistance. The majority opinion therein is a restatement of the minority views expressed in several of its deliverances since Industrial Railways Case, 29 I. C. C. 212, was decided. It is a retrogression to the position taken in that case and which the Commission abandoned, following the decision in the Tap Line Case, *supra*. The minority opinion in the Lorain case prepared by Commissioner Hall points out: "The majority report declares unlawful what we have heretofore found lawful," and "undoes what we have done." "It is, said he, "in essence a return to the doctrine originally announced in the Industrial Railways case * * * and which was abandoned in view of the Supreme Court's opinion."

He further stated that which we believe to be fundamental in considering cases of this kind: "Our function is to regulate and not to prohibit divisions between trunk lines and industrial roads." Whenever the circumstances disclose, as in the instant cases they do not, that the rates are unjustly discriminatory or unduly or unreasonably preferential, it is within the power and it is the duty of the Commission by appropriate order to correct the evil. On the whole, we are constrained to accept the view and reasoning of the minority believing that the majority opinion is out of harmony with the trend of the decisions of the courts, and that if followed it would again throw the whole industrial railway administrative policy into a chaos of incertitude from which it was therefore rapidly and happily emerging.

Based upon the foregoing authorities, we conclude:

First: The services performed by industrial railways in placement of cars at customary points for loading or unloading within the plant industry, when performed in connection with an intrastate road haul over respondents' lines, is a terminal transportation service for which the industrial railways are entitled to reasonable allowance out of the through line-haul rates.

Second: These services when performed by industrial railways for their proprietary industries do not therefore cease to be transportation services.

Third: The complainants are entitled to placement of cars as part of the transportation service, the railroads must under the disclosed circumstances employ the incorporated railroads and make allowances to them out of the line-haul rate. They *may* employ the railroad's facilities of the plant industries where the railroads are not incorporated, in which event the trunk line must make similar allowances.

Jurisdiction for the purpose of determining whether and what reparation should be awarded will be retained and hereafter heard upon separate petitions.

ORDER.

These matters being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answers on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof; and it having been determined therein that the respondents have failed to show that the increased charges are just and reasonable:

Now, to wit, February 18, 1919, It is ordered: That the cancellation of the tariffs complained of be stricken from the files of the Commission and the rates for the services involved be restored to the basis in effect prior to said cancellation except in so far as said basis has since been changed by legally filed, posted and published tariff regulations.

It is further ordered that such tariff publications as are necessary to carry out the order of the Commission shall become effective on or before April 1, 1919, upon one day's notice to the public and the Commission.

It is further ordered that jurisdiction of these complaints be retained by the Commission, for the purpose of determining the amount of damages, if any, which the complainants, or any of them, have sustained, as the basis for an order of reparation.

By the Commission,

WM. D. B. AINEY, *Chairman.*

BOROUGH OF HOMEWOOD v. THE PENNA. RAILROAD COMPANY.*Crossings—At grade—Abolition of—Safety devices ordered installed.*

Complaint was made alleging that the grade crossing in the Borough of Homewood, at the intersection of State Highway Route No. 77, and the tracks of the Pittsburgh, Fort Wayne & Chicago Railroad, operated by the respondent, was dangerous by reason of heavy railroad traffic, obstructed vision of approaching trains and inefficient service by crossing watchmen. It was also alleged that the crossing was frequently blocked by trains which stopped for the purpose of taking on water and that the respondent was about to build another track without first obtaining the consent of the Commission.

The respondent denied that the crossing was unusually dangerous or that the highway was unduly blocked by trains taking on water, and expressed an intention of obtaining the consent of the Commission for the construction of the new track. The jurisdiction of the Commission was challenged on the ground that the railroad was being operated by the Federal Government.

The Commission held that it had jurisdiction to hear and dispose of the case, found the crossing to be dangerous, and ordered plans prepared for its elimination. The respondent was directed to desist from laying additional tracks until the approval of the Commission was first sought and obtained. Safety gates were ordered installed, and the water plug used by trains when taking on water with resulting obstruction to traffic at said crossing, were ordered removed to a place more remote from the highway.

COMPLAINT DOCKET No. 1971.**Report and Order of the Commission.**

P. C. Hamilton, for complainant.

James Stillwell, for respondent.

BRECHT, Commissioner:

The main highway through the Borough of Homewood in Beaver County, is crossed at grade within the borough limits by four tracks of the Pittsburgh, Fort Wayne & Chicago Railroad, which is operated under a lease by respondent. The two outside tracks are used for passenger traffic, and the inner two for freight. The thoroughfare which is crossed is a part of State Highway Route No. 77, leading from Beaver Falls, Beaver County, in a

northerly direction through New Castle, the county seat of Lawrence County.

A complaint has been filed by the Borough of Homewood alleging that by reason of the sharp curve in the railroad at that point, the obstructed view of approaching trains, the great number of trains daily, the heavy traffic over the highway, and the frequent blocking of the street by engines taking in water, this is one of the most dangerous grade crossings in the State, and asking the Commission to abolish the existing crossing and order a separation of grades at that location. It is further alleged that respondent is about to construct an additional track over the highway making the crossing still more dangerous, and that an effort is apparently made to install the new track without first obtaining an order from this Commission. The complainant prays for a restraining order upon the respondent until the matter of the new construction can be heard and determined by the Commission upon proper application.

In its answer the respondent admits in large part the allegations of complainant with respect to the grade crossing but denies that the latter is exceptionally dangerous, or that the highway is continually obstructed by trains or engines. It also admits that it is about to build a piece of additional track over the highway but avers that before it will proceed with the new construction it will make application for an order as required under the statute of July 26, 1913. In an amendment to its answer it is further averred that as the lines of the respondent are in possession and control of the Federal Government under an act of congress, this Commission is without jurisdiction in the issue raised.

After the hearing was held and the report of its engineering bureau submitted, the Commission made an order directing the respondent, the Pennsylvania Railroad Company, to cease and desist from laying its tracks as described in the present complaint and answer until after application for a Certificate of Public Convenience has been regularly filed for approval.

From the testimony and record in the case it appears that the Borough of Homewood lies at the junction of the Pittsburgh, Fort Wayne & Chicago Railroad and the Pittsburgh, Youngstown & Ashtabula Railroad. A "Y" track connects those two lines of railroad, forming the third side of a triangle. The highway from

Beaver Falls to New Castle crosses two sides of this triangle at grade, and a second highway leading eastward from the Beaver Falls-New Castle road crosses the third side of the triangle at grade, making three grade crossings in the borough. Complaint has been filed against only one of these crossings, but any scheme of elimination of the crossing in issue will necessarily involve the other two since all of them are materially affected by the same physical conditions.

The part of the Beaver Falls-New Castle road involved in this proceeding lies within the corporate limits of the Borough of Homewood and is not maintained by the State Highway Department. It is an unimproved street with a dirt roadway about sixteen feet wide. From the south it approaches the present four-track crossing of the Pittsburgh, Fort Wayne & Chicago Railroad on a descending grade of six per cent., crosses the tracks on an ascending grade of two per cent., due to track elevation on curve, and continues northerly a short distance to Clark's run on a descending grade of six per cent. About 250 feet from the crossing a second street branches off from it to the east and crosses the two tracks of the Pittsburgh, Youngstown & Ashtabula Railroad about 150 feet distant. From the branch road leading east the Beaver Falls-New Castle highway runs in a northerly direction about 225 feet, where it leads up to the "Y" track on an eight per cent. grade, and after crossing the latter, continues northward on an ascending grade of eight per cent.

The four tracks of the Pittsburgh, Fort Wayne & Chicago Railroad are on a long compound curve through the Borough of Homewood, making a curvature of five degrees per hundred feet over the crossing. The roadbed is partly in a cut and a high bank south of the tracks on both sides of the highway shuts off the view from the south approach to the crossing. From the north approach the view is cut off by buildings.

The traffic over the crossing is heavy. On the railroad there is a daily average of about 100 trains, half of them passenger, many of them running at a high rate of speed. On the highway a nine-day count shows a daily average of 60 automobiles, 78 horse-drawn vehicles, and 425 pedestrians. As the main road north of Homewood was closed for repairs during the period of the count

the number of automobiles should be no doubt largely increased, probably nearly doubled.

The crossing is protected by a watchman who is on duty during all hours of the day and night. Witnesses for complainant testified that respondent of late has placed ignorant foreigners at the crossing who do not understand the English language and are consequently unable to convey their directions intelligently and thus in becoming very often confused in their signals, endanger the lives of the public. As the evidence clearly shows that this confusion in signals has occurred several times when parties had a narrow escape from accident, the Commission is of the opinion that crossing gates as a precaution of safety should be installed there to be operated by a watchman from the north side of the crossing, where a fairly good view of the tracks in both directions may be had. The great number of trains daily over four tracks make it advisable that a tower be built for the watchman high enough to enable him to see over the top of engines or cars which might be standing on any of the tracks near the crossing.

The testimony shows that there has been some obstruction of the highway by engines taking in water. There are three penstocks or water plugs at Homewood, two located about 150 feet west, and one about forty-five feet east of the crossing. Freight trains only make use of the latter and when doing so will be likely to block the crossing. On behalf of respondent it was testified that this plug is used for emergency purposes only, but the nine-day record submitted shows that an average of thirteen engines daily, ranging from four to twenty-three per day, stopped there for water, many of them remaining as long as twenty minutes. As there is no apparent necessity for the penstock on the east side to be in its present position, it should be moved a sufficient distance to the east, or west of the crossing, if preferable, so that engines in taking in water will not block the highway.

It is apparently admitted that the only feasible plan of eliminating the existing grade crossing is by means of an overhead construction. According to the estimate of respondent's engineer this would involve an expenditure of \$115,000 for construction alone. This amount would be increased by consequential property damages as the testimony discloses to at least \$165,000. In view of

the high price of labor and materials now prevailing it is very probable that the cost would be somewhat greater. While this improvement would be a highly desirable one, the Commission is not persuaded that now would be an opportune time under all the facts and circumstances present in the case to order a grade separation involving so large an expenditure.

Some time after the hearing counsel for respondent filed what he wished to be considered as a memorandum in which he sets forth more or less in detail the necessity for an additional track at grade in Homewood, and asks the Commission for its approval of such construction. It is sufficient in this connection to say that an application for that purpose can not be made a part of this proceeding, but should be filed under a separate petition as required under the provisions of the Public Service Company Law.

With respect to the question of jurisdiction raised by respondent we are of opinion that when it appears that the safety of the public is imperiled at a railroad crossing through inadequate protection by the carrier, it is the primary duty of this Commission under the law to assume responsibility in the matter and take the necessary steps to safeguard life. It evidently was not intended that this supervisory function of the Commission should be superseded when the operation of railroads was placed under Federal control, otherwise all construction work at crossings would have been held to be under the supervision of Federal authority which our records show is not the case. A number of applications have been filed in this department for additions, extensions or reconstruction work by the United States Railroad Administration or where it joined in the petition or appeared as a protestant before this Commission setting forth conclusively that the jurisdiction of state commissions in all matters of that kind has been duly recognized and given sanction by the Federal Government.

From the testimony and record in the case the Commission finds:

- I. That the grade crossing of respondent's tracks over the main highway known as the Beaver Falls and New Castle road in the Borough of Homewood, is dangerous as at present maintained to the safety of the public, and that plans for elimination should be prepared by respondent and filed with this Commission on or before March 31, 1920.

2. That the present crossing is inadequately protected and that safety gates to be operated from a watchman's tower should be installed at the earliest moment.

3. That the penstock or water plug located about forty-five feet east of the crossing should be moved far enough from the highway either east or west, to prevent all blocking of the public road when engines take in water from the same.

4. That the application of the respondent in the form and manner made for an additional track over the crossing has no proper place in this proceeding, and that a separate petition must be filed with the Commission for that purpose.

An order will be issued directing the respondent to make the following changes and improvements at the aforesaid crossing on or before April 1, 1919:

1. To install standard safety gates to be operated by a watchman during all hours of the day and night from a tower erected on the north side of the crossing at a point commanding an unobstructed view of approaching trains from each direction.

2. To remove the penstock or water plug now located about forty-five feet east of the roadway a sufficient distance east or west of the crossing so that engines in taking in water from it will not block the highway.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had and the Commission on the date hereof having made and filed a report containing its findings of fact and conclusions thereon which said report is hereby approved and made part hereof:

Now, to wit, January 20, 1919, It is ordered: That the respondent, the Pennsylvania Railroad Company, shall make the following changes and improvements in its facilities in the Borough of Homewood where the tracks of the Pittsburgh, Fort Wayne & Chicago Railroad cross the public road known as part of Highway Route No. 77.

1. It shall install standard safety gates to be operated by a watchman during all hours of the day and night from a tower erected on the north side of the crossing at a point commanding an unobstructed view of approaching trains from each direction.

2. It shall move the penstock or water plug now located about forty-five feet east of the roadway, a sufficient distance east or west of the crossing so that engines in taking in water from it will not block the highway.

By the Commission,

WM. D. B. AINEY, *Chairman.*

R. F. SWAB, ET AL., *v.* HUMMELSTOWN GAS & FUEL COMPANY.

H. S. BOMBERGER *v.* ANNVILLE & PALMYRA GAS & FUEL COMPANY.

Rates—Gas Companies—Alleged to be excessive—Service.

The Annaville & Palmyra Gas & Fuel Company being the owner of all the capital stock of the Hummelstown Gas & Fuel Company, conducting the business under one management and using one set of books, the complaints were heard and disposed of together.

No evidence being offered to support the charge of inadequate service, the question of rates was the only issue.

It was shown that the net income for the years 1917 and 1918 was about \$4,000; and that increased operating expenses will practically wipe out this amount so that nothing will be left for depreciation, fair return or interest charges. No dividends were ever paid by the respondents.

The Commission held that the rates were obviously not excessive and dismissed the complaint.

COMPLAINT DOCKET NOS. 2439 AND 2446.

Report and Order of the Commission.

Arthur R. Rupley, for complainants.

Walter C. Graeff, for respondents.

RILLING, Commissioner :

The Annville & Palmyra Gas & Fuel Company is owner of all the capital stock of the Hummelstown Gas & Fuel Company. The business of the two companies is conducted under the management of the Annville & Palmyra company at its office, with one set of books. The two complaints above stated were heard and will be disposed of together.

The Annville & Palmyra company serves Annville and Palmyra, in Lebanon County, exclusively, with manufactured gas; the Hummelstown company serves Hummelstown and Hershey, in Dauphin County, exclusively.

The complainants, residents of Palmyra and Hummelstown, by their complaints filed October 18 and 22, 1918, allege that the rates of the Annville & Palmyra company are excessive and unreasonable; that the service of the Hummelstown company is inadequate and its rates excessive and unreasonable. No evidence was offered to support the inadequate service alleged, leaving the unreasonableness of the rates the only issue. The answers of respondents deny the unreasonableness thereof.

No valuation of the respondents' property was offered except in a general way. The Annville & Palmyra company was organized in 1910. A construction company received \$100,000 five per cent. bonds in addition to certain capital stock for constructing the plant. The Hummelstown plant was constructed by the same company for \$50,000 five per cent. bonds and capital stock. A few years ago the Annville & Palmyra company authorized an issue of \$200,000 preferred stock, of which it issued \$153,000 to retire outstanding bonds amounting to \$150,000 and interest thereon. No dividends have ever been paid. Since the construction of the plants extensions have been made, and in order to sell the product many service connections extending from the mains into the houses of patrons were made and paid for by the Annville company. To make these extensions and service connections it borrowed money and it has at the present time floating indebtedness of about \$78,000, which is guaranteed by individual stockholders.

About two years ago the Annville company entered into a contract with the Lebanon Gas & Fuel Company for gas to be delivered to it through a high pressure main from the City of Leba-

non, the Lebanon company reserving the right to increase its rate, which it did a short time thereafter. It again increased its rates, effective October 1, 1918. To meet this increase in the cost of their supply respondents filed new schedules September 25, 1918, effective October 25, 1918, providing for a 50-cent per month ready-to-serve charge, in addition to an increase in meter rates. These schedules are complained of.

The manager of respondents testified that on account of the limited amount of gas required, together with the high cost of materials and labor, it would be cheaper to purchase gas at the increased rate than to manufacture the same. The Lebanon company does not own any of the stock of respondents, nor is it in any way interested therein.

The manufacturing plant of the Annville company which supplied both respondents has not been dismantled, so that when necessary it can again be put in operation.

The operating costs of respondents, as shown by the evidence, are reasonable and were not complained of. Nothing has been set aside on the books of the company for depreciation. The following is an operating statement for a period of years:

<i>Year</i>	<i>Gross Income</i>		<i>Operating Cost</i>		<i>Net Income</i>
1914	\$11,331	54	\$10,534	72	\$796 82
1915	11,201	52	10,616	75	584 77
1916	11,274	74	10,877	66	397 08
1917	14,044	87	10,173	08	3,871 79
1918 (10 mo.) ..	14,761	15	10,657	44	4,103 71

The amount of gas produced by respondents from January 1, 1918, to October 1, 1918, being nine months immediately preceding the effective date of the last increase, was shown. If respondents had been required to pay for the same at the advanced rate, the cost thereof would have been increased \$2,994, indicating that the increased rate will result in an additional operating cost of about \$4,000 per annum and, therefore, practically wipe out the net earnings of respondents as shown by the foregoing operating statements, leaving them practically without any net revenue for depreciation or fair return.

Under such a state of affairs, the Commission does not deem it advisable or necessary to impose upon respondents the burden

of submitting a valuation of their plants, as the facts indicate that a valuation would serve no useful purpose.

The conclusion of the Commission is that the complaints be dismissed, and an order to that effect will accordingly issue.

ORDER.

These matters being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, January 14, 1919, It is ordered: That the complaints in these cases be and the same hereby are dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

NEW JERSEY ZINC COMPANY *v.* CENTRAL RAILROAD OF NEW JERSEY.

Rates—Intrastate railroads—Jurisdiction of Commission—Orders of Director General of Railroads.

Article II, Section 1 (f), of the Public Service Company Law of Pennsylvania, provides that rates fixed by the Commission may not be changed within three years without the consent of the Commission.

On February 17, 1917, the Commission ordered the respondent to establish certain rates. These rates were in force until June 25, 1918, at which time increases were made pursuant to the orders of the Director General of Railroads, without the consent of the Commission. The new schedule applied exclusively to intrastate traffic.

Held: The Commission has jurisdiction to review intrastate rates established by the Director General of Railroads, and the tariff filed June 25, 1918, was ordered stricken off.

COMPLAINT DOCKET No. 2407.

Report and Order of the Commission.

Archibald T. Johnson, for complainant.

RYAN, Commissioner :

On February 7, 1917, this Commission, after full investigation having been made and the filing of record a report containing its findings of fact and conclusions thereon, ordered the Central Railroad of New Jersey "to file, post and publish an amendment or supplement of its tariffs which will cancel and withdraw the filed rates of 75 cents per ton of 2,240 pounds for the transportation of buckwheat or culm coal from the Wyoming region to Hazleton or Palmerton, and of 60 cents per ton of 2,240 pounds for the transportation of buckwheat or culm coal from the Lehigh region to Hazleton or Palmerton and to establish by said supplement or amendment rates for said transportation from the Wyoming region to said destinations not to exceed 51 cents per ton of 2,240 pounds and from the Lehigh region to said destinations not to exceed 36 cents per ton of 2,240 pounds, being the rates determined by the Commission * * * to be the fair, just and reasonable rates for said transportation.

The order of the Commission was obeyed; the new tariffs became effective; and the rates therein prescribed were paid and collected until June 25, 1918, on which date the Central Railroad of New Jersey put in force a tariff fixing charges of 70 cents per gross ton and 90 cents per gross ton in place of the rates of 36 cents and 51 cents adjudged by us to be just and reasonable.

By article II, Section 1 (f), of the Public Service Company Law of Pennsylvania, it is provided, inter alia :

"That, no rate practice or classification which shall have been determined by the Commission shall be changed or discontinued by the Public Service Company directly or through any change in classifications, rules, regulations, contracts or practices, within a period of three years after such determination, without application to and the approval of the Commission, * * *."

No application for any change was made to the Commission and no approval given by it but on the tariff now the subject of complaint, filed by the Central Railroad of New Jersey, appears the following :

"The rates made effective by this schedule are initiated by the President of the United States through the Director General of the United States Railroad Administration and apply to intrastate traffic only. This schedule is published and filed on one day's notice with the Interstate Commerce Commission under General Order No. 28 of the Director General of the United States Railroad Administration dated May 25, 1918, and amended June 12, 1918."

On October 1, 1918, the New Jersey Zinc Company complained of the violation and disregard "of the order of this Commission," setting forth in said complaint the substance of our order of February 7, 1917, and averring the increase. To this complaint the Central Railroad of New Jersey by its president made reply:

"That it denies that it has in anywise violated the order of your honorable Commission dated February 7, 1917, Complaint Docket No. 116, and it denies that it has established and charged and continues to maintain and charge to the complainant the increased rates set forth in the complaint and it alleges that if any such charges have been made they were made by and through the powers of the President of the United States."

The answer of the company is in effect a demurrer and presents as the question to be decided by us: Has the Public Service Commission of Pennsylvania authority to review or set aside rates promulgated by the Director General of Railroads of the United States, for the carriage of merchandise between two places entirely within the boundaries of Pennsylvania.

For the reasons, inter alia, set forth in the opinion this day filed in the case of the Pittsburgh Steel Company v. The Pittsburgh & Lake Erie Railroad Company, we are of opinion that such power of review is lodged with us and further that the striking down of unlawful tariffs and the vindication by enforcement of our adjudications under the Public Service Company Law is our duty. The great war necessitating the calling into being of the extraordinary powers of our government is practically over and the return to the normal conditions of regulated authority under the well defined limitations of the National and State Constitutions will be welcomed by all good citizens. We believe that the judgment of this

Commission in this and similar cases where the same result must in effect be reached will be acquiesced in upon reflection by the Federal authorities for obedience to law is a requirement from officials as well as from people. We therefore direct that the tariff filed June 25, 1918, be stricken off.

ORDER.

This matter being before the Public Service Commission upon complaint and answer, in effect a demurrer, on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, January 14, 1919, *It is ordered:* That the tariff filed June 25, 1918, be stricken off.

By the Commission,

WM. D. B. AINEY, *Chairman.*

RICHARD HOLMES, ET AL., v. MORRIS RUN COAL MINING COMPANY.

Rates—Electric service—Minimum monthly charge—Meters—Discrimination.

The respondent is a mining corporation which has no charter obligation to furnish electric service. It has extended such service, however, from its electrical plant largely for the convenience of its own tenants and at a rate that resulted in an annual deficit.

By a new tariff, effective July 1, 1918, it increased its rates and established a minimum monthly charge. Subsequently the complaint was filed alleging that the rates were unreasonable and discriminatory in that the respondent refused to extend metered service to all who demanded it.

Held: 1. It is not discrimination per se to classify patrons and provide meters for some and not for others.

2. A minimum monthly charge of one dollar for electric service is not unreasonable.

COMPLAINT DOCKET No. 2347.

Report and Order of the Commission.

J. E. B. Cunningham and J. R. Stratton, for complainants.

Edmund E. Jones, for respondent.

AINY, Chairman:

The Morris Run Coal Mining Company was incorporated under the laws of the State of Pennsylvania, and is engaged in the business of mining coal in Tioga County. The land upon which is located the Village of Morris Run, where the company operates, belonged to it, and at the present time ninety per cent. of the dwelling houses erected thereon are owned by the company and occupied by its employees.

The respondent is under no charter obligation to render public electric light or power service. It appears that some years since, it installed a plant for the purpose of generating electricity for its mining operations. Following this it wired some of the dwelling houses and supplied its tenants with electric lights. It gradually extended this service until it now has 276 consumers of electricity.

This public service was performed by it, as the evidence shows, at less than cost, and the purpose, as stated by the company officials, was to improve the living conditions at Morris Run and to promote civic interest.

According to the company's books, its actual losses for this public service over a series of fiscal years, ending November 1st, were as follows: In 1915, \$417.57; in 1916, \$893.35; in 1917, \$1,775.57; in 1918, \$3,103.33. Because of the mounting losses on operation, the company filed a new tariff, effective July 1, 1918, under the terms of which its flat rate service charges were increased from thirty cents per month for a sixteen candle power lamp to sixty-five cents per month for a twenty-five watt lamp, and it imposed a minimum monthly charge of \$1.50, which amount it is agreed shall be reduced to \$1.00.

On September 5, 1918, after the effective date, this complaint was filed, alleging that the increased rates were unjust and unreasonable, and in the complaint it was alleged that the respondent was discriminating against its patrons by refusing to install meters for those of its consumers who desire metered service.

It appears that out of the 276 customers there are but nine having meters. All of those metered consumers, with the exception of the postmaster and possibly one other, have from fourteen to one hundred lights installed. Of the 276 flat rate consumers seventeen have but one light, eighty-seven have two, one hundred and

seven have three, forty have four, eleven have five, three have six, and two have seven lights.

If we were to compel the respondent to equip this locality with metered service, it would be at an expense of several thousand dollars, and would unquestionably require a very material increase in the rates which the present flat rate consumers pay, and therefore the idea, which evidently actuated the complainants in bringing this complaint, that being placed on a metered basis would give them more favorable rates than they now receive on the flat rate base, would not be realized.

We are not prepared to say that in all cases it constitutes unjust discrimination to classify consumers and provide meters for some and not for others. Each case must be decided upon the facts which it furnishes.

It was not seriously contended that the flat rates were unjust and unreasonable. In fact, it was clearly demonstrated by the books of the company that the present rates would yield respondent a sum barely sufficient to pay the operating expenses without allowance for depreciation or any provision for fair return. So long as the company is willing to continue its service on this basis, and not to exact any profit on its investment for property devoted to public use, it seems unwise to require the installation of meters for patrons using such a small number of lights.

In reaching this conclusion, the Commission takes into consideration that this mining company is not operating its electric service for the purpose of profit, that it is not at all certain that it can be compelled to continue its electric lighting if it seeks to withdraw from the field of public service.

Metered service has commended itself to this Commission in many instances, but like all administrative policies is not to be arbitrarily enforced in all cases. The final test is the public convenience and benefits. So, considering this case, we are of the opinion that to order meters to be installed for those patrons who have such small numbers of lights would necessitate increased rates for no greater service than they now receive.

The language of respondent's tariff is not free from objection. An appropriate supplement should be filed, clearly indicating those who are entitled to metered service and those who are not, that they, being classified, may be advised. The minimum charge of \$1.00 should be substituted for the filed rate of \$1.50.

The complaint, with respect to the matters indicated, should be sustained.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had, and the Commission on the date hereof having made and filed a report containing its findings of fact and conclusions thereon which said report is hereby approved and made part hereof :

Now, to wit, February 10, 1919: *It is ordered:* That the respondent, the Morris Run Coal Mining Company, shall file a supplemental tariff within ten days from the date of the service of this order, effective upon one day's notice to the public and this Commission, which said supplement shall be classified to clearly show those entitled to metered service and those entitled to flat rate service and providing for a minimum charge of \$1.00 per month.

By the Commission,

WM. D. B. AINEY, *Chairman.*

BELLWOOD CHAMBER OF COMMERCE *v.* ALTOONA & LOGAN VALLEY
ELECTRIC RAILWAY Co.

Railway companies—Rates—Zones—Comparisons—Discrimination.

The complaint charged unlawful and unjust discrimination against the patrons on the Bellwood line of the respondent in that they were charged one more fare than patrons on other suburban lines of the respondent for a ride of practically the same length.

No evidence was adduced in support of the comparisons to show similarity of service, traffic and equipment.

The Commission, finding substantial differences in equipment and operating conditions, declared that the comparison of distances alone could not support an allegation of discrimination, and thereupon dismissed the complaint.

COMPLAINT DOCKET NO. 2354.

Report and Order of the Commission.

George M. Myers, for complainant.

H. B. Gill, for respondent.

BRECHT, Commissioner:

The Altoona & Logan Valley Electric Railway Company, respondent, is a consolidated company operating a system of trolley lines in the City of Altoona and its immediate suburbs. It also operates an interurban line extending eastward from Altoona to the Borough of Bellwood, a distance of 7.6 miles, and thence to the Borough of Tyrone, a distance of about 7.4 miles; and a second line 7.24 miles long running in a southwesterly direction from Altoona through Hollidaysburg to the adjacent Borough of Gaysport.

Between Altoona and Bellwood there are three fare zones maintained, between Bellwood and Tyrone two, and between Altoona and Gaysport, two. The same rate of fare is charged on each of these zones, which seems to have been the practice ever since these lines were put in operation. A 5-cent fare was charged until September 8, 1918, when the rate was regularly increased under a published tariff to 6 cents, which is now effective. No tickets of any kind have been issued by respondent since some time in 1917.

The complainant alleges unlawful and unjust discrimination against patrons of respondent's lines in that they are charged one fare more, or a fifty per cent. higher fare on the Bellwood division than on either the Tyrone or the Hollidaysburg lines for the same length of ride. The complaint is directed against the old rate of 5 cents and against the new rate of 6 cents, and also against any rate of fare on the Bellwood division which will be in excess of the fare respondent may be allowed to charge for an equal distance upon any of its other lines. Respondent denies all charges of unjust and unlawful discrimination.

The testimony shows that the number of zones and substantially their respective locations have always been the same since the system of trolley lines was established, with the exception that during the winter of 1893, for a short time three zones were maintained on the Hollidaysburg line. The Hollidaysburg division is a double-track construction practically all the way and is operated on a fifteen-minute schedule; the line to Bellwood and Tyrone is a single track and is operated as a continuous through service every thirty minutes. The cars used on the Tyrone division are modern high-speed steel cars of heavy construction; those on the

line to Hollidaysburg are old type wooden cars of lighter weight and consume less power to operate them.

Figures were submitted by respondent which show that in 1917 there were 4,099,320 revenue passengers carried on the Hollidaysburg division, and on the Bellwood-Tyrone division 2,239,081. This record was offered as typical of the normal yearly traffic on these two divisions and indicates that the former line carries about twice as many passengers in any given period as the latter. Respondent also presented through its manager an estimate of population from which it appears that the territory tributary to the Hollidaysburg division outside of Altoona has a population of between 15,000 and 20,000, or about 2,000 persons per mile of track; the Bellwood-Tyrone division about 14,000, or approximately 1,000 persons per mile of track. No other figures or estimates of population were offered in evidence.

In going to Altoona, a distance of 7.6 miles, a passenger from Bellwood must pay three fares but can get a transfer in the third zone from the interurban car which entitles him to ride without additional fare to any part of the City of Altoona reached by the lines of the respondent. A passenger in going from Hollidaysburg to Altoona, a distance of 7.25 miles, pays two fares, but is not accorded the privilege of a transfer to any part of Altoona. Expressed wholly in terms of miles it means that three zone fares, or 18 cents, are charged on the Bellwood line to ride 7.6 miles, or if the passenger so elects, 10.67 miles; on the Hollidaysburg line, 12 cents to ride 7.25 miles. With the transfer privilege included the rate of fare therefore on the Bellwood-Altoona division is .0169 cents per mile, on the line to Hollidaysburg .0165 cents, showing substantially the same rate of fare over the two divisions as a whole.

Counsel for complainant however stated that the transfer privilege in Altoona is of little or no advantage to the people of Bellwood and is not desired if responsible for the increase in the number of zones and the additional fare over their line to Altoona. Respondent was unable to produce figures which would show to what extent these transfers are demanded and used by the community of Bellwood. But from the figures submitted it appears that in 1917 there were altogether 58,800 transfers issued to and from this line, and 45,600 of them used, showing quite a sub-

stantial demand for the same on the part of some portion of the public. The City of Altoona, the Borough of Juniata, East Altoona, Tyrone, and all intermediate points as well as Bellwood, are affected by the transfer system. The practice of the respondent in this respect could not be discontinued therefore merely upon a request from any one of the localities which may believe itself adversely affected in its local zones by a privilege accorded to all patrons of the road and which apparently has been established many years for the convenience, accommodation and safety of the traveling public.

The division from Bellwood to Tyrone is a continuation of the Bellwood line and service from Altoona. But being further removed from the chief center of population, and located in a sparsely settled rural community, and operated either against or at the extreme end of the trend of travel, it presents features of an economic and operating character that differentiate it very materially from either of the other two divisions. It may therefore for all purposes of comparison be eliminated from further consideration in this proceeding.

The individual zones between Bellwood and Altoona are lengthened by means of "overlaps," one of these being a mile or more in length. Under this plan a person from Bellwood can ride for two fares to the car shops at Second street, in the Borough of Juniata, a distance of approximately six miles, while persons living along the line are given the advantage of flexible zone limits. Complainant in asking that Bellwood be placed in the second zone from Altoona bases his petition chiefly, if not solely, upon a comparison of mileage, which in and of itself is not an adequate factor to determine the length and location of zones. Under the statute it is contemplated that in order that zones upon the same or different lines of interurban railway may be practically of the same length, the conditions and circumstances affecting the service must be substantially similar.

As already stated substantial similarity does not obtain in the present instance. The Hollidaysburg division is practically a city line, the car being never out of sight of houses; seventeen regular station stops are maintained on it and altogether fifty-six stops made for the accommodation of passengers. The cars upon this line being lighter are less expensive to operate, the schedule is

twice as frequent, the traffic is one hundred per cent. heavier according to the figures submitted, the number of cars operated greater, and the income per mile of road as disclosed by the evidence, four times larger than on the Bellwood line.

There is also another traffic feature present which differentiates the service upon these two lines of railway. The city system is not operating cars over any portion of the Hollidaysburg line, but on the Bellwood division two lines of city cars furnish service as far as East Altoona, one of which is operated practically all the way over the Bellwood track. Under these circumstances East Altoona, the end of the city service, must of necessity become the limit of the first zone out of Altoona on the Bellwood line, otherwise there would be an inequality in the rate of fare charged on the city and interurban cars to ride the same distance in the same direction over substantially the same tracks. Should only two zones be maintained to Bellwood as complaint prays for, that would make the second zone extend from East Altoona, a distance of 4.97 miles, making it a preferential zone, .72 miles longer as against Hollidaysburg, and .67 miles as against Tyrone, if distance alone were to control in the length and location of zones. The plan proposed would not eliminate the inequality in length of zones upon the two divisions.

This Commission has taken occasion in a number of cases to say that the element of distance is only one factor that must be considered in arriving at a just and equitable rate for transportation upon an interurban street railway. In *Elias Sassaman v. Lehigh Valley Transit Company*, 2 P. C. R. 60, the Commission held:

"That existing local conditions are always a factor which must be considered in the work of arranging a correct schedule of rates on the different lines of a transportation plant. The size of the cars operated on a line, the frequency of the service furnished, the density of the population of the adjacent territory, the grades and general alignment of the roadbed, the annual outlay required for repairs and upkeep on the different branch lines all figure more or less in the rate problem, and must be considered * * * in their proportionate bearing upon the matter."

In *Borough of Catasauqua v. Lehigh Valley Transit Company*, 6 P. C. R. 81, P. U. R. 1918 B., 716, the Commission in its opinion said:

"It is not to be expected that a street railway system can so adjust its traffic conditions that it will charge all places along its lines the same rate of fare per mile. * * * This of necessity will be the case as long as street railway fares are predicated upon the present zone system which prescribes a fixed rate, usually five cents, for a shorter or longer run dependent upon local conditions. As a rule the length of the run for the unit of fare is controlled to a greater or less extent by the topography and population of the country affected, the proximity of large cities that determine the flow of travel, the markets and industries established along the line, the volume of traffic to be moved between certain points, the value of the rights of way, the length of the road as a whole, and kindred circumstances that may have to be duly considered in rendering service that will be for the best interest of the public and the road operating."

In 1912 the City of Altoona raised the same question here in issue in a complaint filed before the Pennsylvania State Railroad Commission in which among other things it was alleged that the rate of fare charged from Bellwood to Altoona was discriminatory as compared with the rate charged on the Hollidaysburg line and the Tyrone division of respondent's system. There is nothing appearing in the record and evidence of the present complaint showing any change in conditions on these two divisions that have been made since that adjudication. In its report the State Railroad Commission held that:

"After carefully weighing all the facts offered at the hearing of the *City of Altoona v. Altoona & Logan Valley Electric Railway Company*, and viewing them in their proper relations and connection, the Commission is of the opinion that the schedule of fares adopted by the respondent upon its lines and respective zones, is not excessive, unreasonable or discriminatory. * * *; and therefore the case is dismissed."

From the evidence and record the Commission finds that the operating equipment and the traffic conditions substantially distinguish the service of the Hollidaysburg divisions from the Bellwood line, and therefore the allegations of unlawful and unjust discrimination based upon a mere comparison of distance or length of fare zones can not be sustained. An order will issue dismissing the complaint.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, February 4, 1919, *It is ordered:* That the complaint in this case be and the same hereby is dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

L. F. MILLER & SONS *v.* THE PENNSYLVANIA RAILROAD COMPANY,
KEYSTONE ELEVATOR AND WAREHOUSE COMPANY.

Railroad companies—Service—Discrimination—Warehouse.

The railroad by supplemental tariff withdrew as a point of delivery for hay and straw the Keystone Elevator and Warehouse at North Philadelphia. The complainant alleged that this withdrawal worked a hardship upon the dealers of hay and straw in the locality affected and gave undue advantage to dealers in other parts of the city where such warehouses are still maintained. It was also contended that the railroad is under an obligation to furnish such service as a convenience to its patrons.

Held: A warehouse for the storage of freight in carload lots is not a facility that the railroad is bound to furnish, and the withdrawal of the same as a point of delivery for hay and straw is not discrimination.

COMPLAINT DOCKET No. 1910.

Report and Order of the Commission.

Chester N. Farr, Jr., and Wm. A. Glasgow, Jr., for complainants.

Henry Wolfe Bikle, for Pennsylvania Railroad.

M. Hampton Todd, for Keystone Elevator and Warehouse Co.

ATNEY, Chairman:

The complainants are wholesale dealers in hay, grain and feed, in Philadelphia. The complaint is occasioned by the filing by the Pennsylvania Railroad Company of a tariff known as "Supplement No. 1. to G. Q.—P. B. C. Pa. No. 1909" to become effective February 6, 1918, withdrawing as a point of delivery for hay and straw the warehouse of the Keystone Elevator and Warehouse Company at North Philadelphia. Because of suspension the supplement did not become effective until December 6, 1918. The complaint stated:

1. That the amendment was a violation of Article III, Section 8 (f), of the Act of July 26, 1913, in that it subjected the locality as respected the traffic in hay and straw, and the complainants and other persons dealing in hay and straw in that locality, to an undue and unreasonable prejudice or disadvantage, and gave an undue or unreasonable preference or advantage to other persons, firms and corporations dealing in hay and straw, in other parts of the city.

2. That the amendment violated Article II, Section 1 (a), of the same act, in that its effect was a failure to furnish and maintain such service as should be reasonably adequate and practically sufficient for the accommodation of the patrons of the Pennsylvania Railroad Company.

In support of these propositions, complainants state that in other parts of the city warehouses are maintained for the delivery of hay and straw and these have not been eliminated.

The warehouse of the Keystone Elevator and Warehouse Company is part of a building owned by the Pennsylvania Railroad Company, located on Glenwood avenue, near Broad street, and south of the North Philadelphia passenger station. This building was originally used jointly for freight and express traffic. It is now occupied by the Adams Express Company to the ex-

tent of 6,255 square feet. This space has been used by the express company since October 1, 1911; prior to that time, and as far back as 1908, but 4,480 square feet were used, and between 1903 and 1908 but 1,500 square feet were thus occupied. The balance of the floor space, amounting to 5,161 square feet, is used by the warehouse company.

Under tariff provision of the Pennsylvania Railroad, the facilities of this warehouse are extended to all freight arriving at North Philadelphia, but the record shows that but little freight other than hay and straw passes through the warehouse. The unloading of the freight is performed by the Keystone Elevator and Warehouse Company for compensation paid by the railroad company. After the expiration of the free time, which is the term used to describe the period immediately after unloading for which no storage charges are made, the warehouse company becomes the bailee for the owners of the property.

This hay warehouse was described by witness for the complainants as a headquarters or market for the buying and selling of hay and straw. The goods can be thoroughly inspected, are weighed and checked by the warehouse company, and are sold and oftentimes resold on the floor. The weights of the warehouse company are those used by the railroad in arriving at the proper freight charges. In fact, the freight charges are collected by the warehouse company and remitted to the railroad. When delivering to teams, the warehouse company furnishes a weight slip to the driver which is in turn delivered to the customer with the goods.

The business of the Adams Express Company at its North Philadelphia office has increased to such an extent that the express company must be provided with more floor space. The business of the express company by years shows the following:

1902	\$50,000
1913	300,000
1914	196,000
1915	219,000
1916	262,000
1917	438,000

The decrease in 1914 was due to a reduction made in the zone served by the North Philadelphia office, but in spite of this reduced district and the inauguration of the parcels post and the reduction in express rates, the business increased as shown in the years following. About eight cars per day are handled at the express platform, which is not sufficient to relieve the congestion of express business. The car space at the express company's platform is but 137 feet, which permits the spotting of but two 50-foot cars. The space now occupied does not permit of distributing promptly the inbound business according to wagon zones. Some receivers find it to their advantage to call for their shipments rather than wait until the express company's trucks can deliver them. There are twelve automobile trucks now in the service. The express business aggregates 230,000 to 250,000 pounds, whereas the hay warehouse handles approximately 80,000 pounds per day. With a view to relieving the congestion and rendering better service to the public, the railroad company determined to devote the entire building to the express business and discontinue the hay warehouse.

The only other warehouses in the City of Philadelphia on the Pennsylvania Railroad where similar arrangements and practices prevail are located at Thirty-first and Chestnut streets, and in Kensington, and are known as "Merchants Warehouse." They are larger than the warehouse of the Keystone Elevator and Warehouse Company at North Philadelphia, the West Philadelphia house having a capacity of 190 cars, and the Kensington house 55 cars, while that at North Philadelphia accommodates but twelve. The only other place on the Pennsylvania Railroad where a similar arrangement is in effect is at Baltimore, where there is one warehouse. New York has hay warehouses but charges are exacted for the unloading of shipments, and the situation is substantially different. The Philadelphia & Reading Railway delivers an equal amount of hay and straw in Philadelphia, but has no warehouses, track delivery only being made.

The warehousing privilege has in no way affected the rates to Philadelphia as applicable to hay and straw.

The respondent's witness testified, and it was not disputed, that this method of doing business was established as a competitive measure in order to influence the movement of the traffic.

From the statements made of record we are inclined to concur with the deductions made by the respondent railroad as expressed in the introductory statement of argument "that the use of the building in controversy for the storage of hay and straw is desired to be continued * * * solely and exclusively because it facilitates the commercial transactions in which the complainants engage."

Respondents direct attention to the fact that the protest is made not only by the consignee of hay and straw but by jobbers and dealers who use the warehouse to make sales to their customers.

In answer to the charge of inadequate service, in violation of Article II, Section 1 (a), of the Public Service Company Law, resulting from the elimination of the hay and straw warehouse, the respondent carrier, alluding to Section 1 of Article I of the law defining service as the facilities of public service companies used or furnished or supplied "in the performance of their duties," outlines the duties which the law imposes upon railroads. Respondent asserts that "a common carrier is a bailee undertaking for hire to transport the goods of such as choose to employ him from one place to another. His undertaking includes the receipt of the goods at the point of origin and their delivery at point of destination, and to his patrons he owes reasonable service in respect of the receipt, the transportation and the delivery of the property; but beyond these duties he undertakes nothing and he owes nothing to his patrons and the public." In support of this position the respondent cited a number of authorities. The principle is thus stated:

"The business of a railroad company is transportation and to supply the public with conveniences not connected therewith is no part of its ordinary duty." *Great Northern Railway Company v. Minnesota*, 238 U. S. 340, 345.

The complainants are asking for a service which the record shows is covered by no increment of compensation included in the freight charges.

Respondents point out that it is admitted by complainants that their goods can be unloaded in the customary way by unloading the cars where they stand on the tracks.

The service extended to hay and straw at these warehouses is unusual in that warehouse facilities are not in general practice extended to carload freight, unless it be to the convenience or benefit of the carrier by releasing equipment or relieving track congestion.

As to the charge of discrimination in favor of Thirty-first and Chestnut streets and Kensington, respondents argue that no undue or unjust discrimination exists since all dealers will be in the same position to make deliveries to North Philadelphia. It is pointed out that North Philadelphia cannot complain of discrimination any more than other stations where no warehouse is located. Furthermore, the Philadelphia & Reading Railway brings into the city about fifty per cent. of the hay and straw and has no hay warehouse on its line. To discontinue the warehouses at Thirty-first and Chestnut streets and at Kensington would not result in any advantage to the complainants.

Respondent further contends that even if discrimination could be predicated on the facts in this case, the order of the Commission would have to be an alternative one and the abandonment of the other hay warehouses to remove the discrimination would be of no benefit to the complainants. *Great Northern Ry. Co. v. Minnesota*, *supra*.

The railroad company claims to have shown ample justification for the discontinuance of the warehouse at North Philadelphia in the growth of the express business in that district and the necessity for additional space at the warehouse in order to render adequate service. It is contended that the greater needs of the public are clearly shown by the comparison of the volume of the hay traffic and the express traffic. That the hay and straw are not removed as promptly as might be desired and that if handled from the team track economy in the use of the carriers' equipment would be accomplished.

Question was raised at the hearing as to a possible increase in the reconsignment charge on hay and straw, as in effect from the hay warehouses, resulting from the discontinuance of the hay warehouse at North Philadelphia. Respondents' witness testified that the tariff as corrected placed the consignees at North Philadelphia in the position that they could not reconsign on a competitive basis

with the other sections of the city and the other warehouses. This situation, witness said, would be taken care of.

An examination of the tariff publishing the rates for reconsignment discloses a blanket rate of \$2.10 per car as in effect from the hay warehouses to private sidings in a limited area. From other sidings and stations in the City of Philadelphia higher rates are in effect. The record does not develop this feature of the case as to the extent of the use of these rates for reconsignment, nor as to whether in practice discrimination actually results. The rates for reconsignment should have the attention of the carrier and unduly discriminatory features, if they exist, should be removed.

Upon consideration of all of the facts of record, we find that the respondent was warranted in discontinuing the warehouse facilities and that complainants failed to establish and we are unable to find any undue or unjust discrimination as a result of said discontinuance.

The complaint will therefore be dismissed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, February 4, 1919, It is ordered: That the complaint in this case be and the same hereby is dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF THE BOROUGH OF CATASAUQUA.

Municipal electric plant—Existing public service company.

The Borough of Catasauqua applied to the Commission for approval of the construction of an electric light and power plant within the limits of said borough for the manufacture of electricity for its own use and that of its inhabitants as well as for commercial purposes outside of its limits.

The Commission found that the community was already being adequately served by a public service company and concluded that the construction of another plant would bring about destructive competition and economic waste. The approval was accordingly refused.

APPLICATION DOCKET No. 836—1916.

Report and Order of the Commission.

Francis G. Lewis, for the Borough of Catasauqua.

R. J. Butz, for the Lehigh Valley Light & Power Co.

Wm. H. Schneller, for certain citizens of Catasauqua.

AINEY, Chairman:

We are not convinced that two electric lighting systems in the Borough of Catasauqua, one municipally and the other privately owned, are necessary for the service, accommodation, convenience and safety of the public, and for that reason the application of the borough authorities to construct an electric light and power plant, duplicating the lines and service of the Lehigh Valley Light & Power Company, is refused.

We have frequently had occasion to state an undoubted truth that the duplication of facilities engaged in public service usually results in economic waste, the burden of which ultimately falls upon the patrons. Under the regulatory laws of Pennsylvania, the public are entitled to adequate service at reasonable rates at the hands of utility companies. If the revenues are to be divided between two competing companies, it follows that neither can maintain as good service or at as low rates as one company otherwise could. In final results the public have to pay for the maintenance of both companies, and the burden is the same whether it is imposed by rates for service rendered or by taxes levied.

The Lehigh Valley Light & Power Company now serves the Borough of Catasauqua. Its poles and wires by municipal consent occupy the streets, and it has a considerable investment in that borough. Should we permit the municipality to engage in the business of electric lighting, the electric light company would be in competition with the municipally owned plant and thereby there would be created a condition which wide experience has led the regulatory bodies throughout the United States to oppose as burdensome to the public.

If there is one truth which we must all learn with respect to utilities, it is that they cannot adequately serve us unless they receive at our hands a revenue sufficient to meet their operating expenses, provide for a depreciation reserve and a fair return upon the investment. It is as inimicable to the public welfare for a utility to collect less than sufficient to meet its proper expenses to keep its services to the standard of public convenience as it is to permit it to charge its patrons too much. There is a close relationship between the reasonable rates and the adequate service which these rates provide. One cannot have the latter without paying the former. Two plants in Catasauqua, one municipally owned and the other privately owned, duplicating each other's facilities thus doubling the investment for public service, would create a situation burdensome to the rate payers and with no corresponding public benefit.

Where municipalities are so situate that they desire to engage in certain lines of public service, under ordinary circumstances the first step in their undertaking should be to relieve the locality and patrons from the burden of the competition of a privately owned plant, and this is none the less so where as in this case there is an ordinance carrying a provision that the granting of permission to the protestant company to occupy the borough streets shall not "prevent the said borough from installing its own electric light and power plant."

We do not intend by this to establish an unalterable policy. There may be instances where a utility company has been so indifferent to and so neglectful of its public obligation that this Commission would be justified in admitting competition, thus selecting the lesser of two evils.

Here there appears to be no inadequacy of service on the part of protestant except such as may be promptly remedied. The Public Service Company Law has provided a method by which utilities may be required to fulfill their public duties, and upon complaint and proof this Commission will make reasonable orders.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition and protest on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, February 18, 1919, It is ordered: That the Certificate of Public Convenience prayed for be and the same is hereby refused.

By the Commission,
WM. D. B. AINEY, *Chairman.*

WILLIAM A. BUZZARD *v.* PEN ARGYL GAS COMPANY, INC.

Service—Gas companies—Extensions—Agreement of company.

The complaint was directed against the respondent for failure to extend service to the residence of the complainant which was several hundred feet distant from the service lines. The residence was constructed in reliance on said promise. It was shown that the prevailing high prices for labor and material will make this extension unduly expensive and that no adequate return could be expected. It appearing that the respondent stood ready to make the necessary extension as soon as the necessary pipe and labor could be procured, the Commission ordered the same to be completed on or before September 1, 1919, and dismissed the complaint.

COMPLAINT DOCKET NO. 2364.

Wm. A. Buzzard, for complainant.

Harry D. Jones and *J. E. B. Cunningham*, for respondent.

McCLURE, Commissioner :

The complainant resides on Speer avenue, adjoining the Borough of Pen Argyl, Northampton County. He has a house with ten rooms and bath and applied for gas service for lighting and heating, which was promised him by the president and the treasurer of the respondent company. The Blue Mountain Consolidated Water Company in August, 1916, laid a main along Speer avenue and a service line to complainant's house. The gas company, availing itself of the privilege extended by the water company, laid a one-inch gas pipe in the trench from William street along Speer avenue to a point opposite the complainant's house and from thence into his cellar. This line is upwards of 400 feet in length. It is not connected with the company's mains. To make this connection would require 300 feet of three-inch pipe to be laid in the Pennsylvania avenue extension from the present terminus of the three-inch line in that street to Speer avenue, or 450 feet of pipe to be laid from the end of the one and one-half inch line located in William street to Speer avenue. This William street line, however, is a temporary one now used to its capacity, and if extended to Speer avenue, would have to be supplanted by a larger main. The cost of laying the line in Pennsylvania avenue extension at present prices was estimated to be \$348.35. There is no guarantee of any amount of gas which will be used by the complainant. No other consumers are on this line in Speer avenue and there is no reasonable expectation of any in the near future. The company has expressed its willingness to furnish this service but was unable to do so on account of its lack of ability to secure the pipe, the high cost of labor and the want of funds and credit. The cost of the pipe necessary to connect up the service to the complainant's house, as stated above, would be \$348.35. Allowing two per cent. for depreciation and eight per cent. for return on capital would require an annual charge of \$34.83 to meet the investment. The evidence disclosed the present operating cost to be in the neighborhood of 94 cents per 1,000 feet, and the rates \$1.50 per 1,000 feet where the consumption is from 3,000 to 10,000 feet per month. So that to fully reimburse the company for the extension and the service would require the consumption of 64,000 feet yielding a revenue of \$96 per annum. The average meter consumption of the respondent company is

12,400 feet, which yields an income of \$17.05 per annum. Were we to assume that the complainant would use two or three times the amount of gas consumed by the average patron of the company, the net return would fall far below the fixed charges caused by the extension. However, as the officers of the company promised the complainant to make the extension to his house and he seems to have built relying on that promise, and at the hearing they expressed their willingness to give him service when able to secure the necessary pipe and labor, the complaint is sustained, gas to be supplied to the complainant on or before September 1, 1919; and an order to that effect will issue.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon which said report is hereby approved and made part hereof:

Now, to wit, February 4, 1919, It is ordered: That the respondent, the Pen Argyl Gas Company, Inc., supply gas to the complainant at his residence on Speer avenue, in the Borough of Pen Argyl, Pennsylvania, on or before September 1, 1919.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF THE BOROUGH OF PUNXSUTAWNEY.

Municipal water works—Existing public service companies—Inadequate service.

The applicant sought the approval of the Commission for the construction of a municipal water plant. Protests were filed by the Punxsutawney Water Company and the Lindsay Water Company, two companies which were already serving the community. It was shown that the service being rendered by the protestants was entirely inadequate, and that the two companies were over-capitalized and mismanaged.

The Commission directed the applicant to negotiate with the protestant for the purchase of their plants, failing which such action will be taken by the Commission seems necessary.

APPLICATION DOCKET NO. 186—1915.

Report and Order of the Commission.

Gillespie & Gillespie, Lex N. Mitchell, and W. B. Adams, for applicant.

Arthur B. Stewart, John W. Reed, H. H. Mercer, and Edwin W. Smith, for protestants.

AINEY, Chairman, Jan. 14, 1919:

On June 15, 1915, the Borough of Punxsutawney filed its application for a certificate permitting it to construct a municipal water plant. To this application protests were filed by the Punxsutawney Water Company and Lindsay Water Company, two public service companies now serving said applicant borough. Hearings were held and a large amount of testimony was taken. Briefs were filed and oral argument had. The books and accounts of protestants were audited and a report made thereon. An engineering conference was agreed upon and report of such conference was made to the Commission.

The Borough of Punxsutawney, which has a population of upwards of 10,000, is situate on Mahoning creek, in the southern part of Jefferson County. It is served by the Punxsutawney Water Company and the Lindsay Water Company, the latter controlling the former and furnishing its water supply. The two companies are practically operated as one and control the Big Run Water Company, organized to serve Big Run Borough, nearby. The service in Big Run Borough, however, is rendered by the Lindsay Water Company.

In the application for a certificate, it is alleged that the service of protestants is inadequate and their rates excessive, unreasonable and discriminatory.

The financial affairs of the two water companies being involved, receivers were appointed for both, who are now, under the direction of the court, operating the same. From the testimony it ap-

pears that the service rendered to applicant borough by protestants has been inadequate, both in the character of the water supply and the pressure for domestic and fire purposes. Since the taking of the testimony, complaints continue to be made to the Commission that such inadequate service continues. The report of the engineering conference sets forth in great detail the reproduction cost new less depreciation of the protestants' plants, the estimated cost of the proposed municipal plant, together with estimated cost of such additions and extensions deemed necessary to enable protestants to render adequate service. Said report further indicates in detail all the local conditions relating to the sources of water supply in and about applicant borough, as well as the adequacy of the proposed municipal plant.

Reports of protestants' affairs indicate mismanagement and their capitalization is much in excess of the probable fair value. The bondholders have instituted proceedings to have the property sold. Pursuant to a suggestion made by the Commission, the municipal authorities have been negotiating with a view of having the municipality acquire the property of protestants. No agreement has been reached.

The existing situation is unfortunate and presents a more or less perplexing problem. Its continuation should not be permitted. Should the application be approved it will result in the operation of two plants, creating a competitive situation with its accompanying evils of poor service and economic waste. Should it be refused it may mean a continuation of past unfortunate conditions. The desideratum would be the acquisition, at a fair value, of the present plants of protestants by the municipality and the making of such extensions and additions thereto as would insure adequate service. Before taking any definite action the Commission will require applicant to offer to purchase protestants' plants at a fair value, setting forth in its offer the amount it deems such fair value to be. The protestants should either accept this offer or set forth their reasons for refusing. If they are unwilling to sell on account of the price offered, they should submit with their refusal the price at which they would be willing to sell. In case no agreement is reached each side should consent to submit to arbitration the price to be paid. Upon the refusal of either party to accede

to the foregoing suggestion within thirty days from the date hereof, the Commission will take such action in the matter as it deems just and proper.

APPLICATION OF B. & O. RAILROAD COMPANY.

Additional crossing at grade in the Borough of Hays, Allegheny County.

APPLICATION DOCKET No. 2114—1918.

Report and Order of the Commission.

George H. Stein, for applicant.

W. L. Conegly, for protestant.

BY THE COMMISSION :

This is an application by the Baltimore & Ohio Railroad Company, operating the Wheeling, Pittsburgh & Baltimore Railroad Company, for approval of the construction of an additional track at grade across Watson street, in the Borough of Hays, Allegheny County ; protested against by the Borough of Hays on the ground that the additional track will render the present grade crossing of Watson street more dangerous.

From the testimony we find the following facts :

(1) That the proposed additional track which will connect a siding three-eighths ($\frac{3}{8}$) of a mile long, north of Watson street, with a siding four (4) miles long, south of Watson street, is necessary for the efficient operation of the petitioner's railroad and the accommodation of the public by giving better transportation facilities.

(2) That the additional track will not place any new servitude on the highway crossed, nor increase the number of train movements over the highway.

We are therefore of the opinion that the application should be approved subject to the following conditions :

First: That the Baltimore & Ohio Railroad Company, operating the Wheeling, Pittsburgh & Baltimore Railroad Company, shall plank the additional crossing herein approved, with oak or other suitable timber, solid between the rails for the full width of the highway.

Second: That a telephone pole of the Bell Telephone Company of Pennsylvania located on the highway near the point of crossing of the additional track be relocated in a manner satisfactory to the said telephone company.

Third: That the railroad company maintain a watchman for the protection of the crossing, to be on duty from 6:00 a. m. to 6:00 p. m. each and every day of the year.

Fourth: That no trains be allowed to stand and block the crossing for more than five (5) minutes at any one time.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition and protest on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, February 4, 1919, It is ordered: That a Certificate of Public Convenience be issued evidencing the Commission's approval of the construction, operation and maintenance of said crossing at grade in accordance with said report and subject to the conditions specified therein.

By the Commission,
WM. D. B. AINEY, *Chairman.*

OAK EXTRACT COMPANY *v.* NEWPORT & SHERMAN'S VALLEY R. R. Co.

Intrastate railroads—Rates—Jurisdiction of the Commission—Increase ordered by Director General of Railroads—Relinquishment of Federal control.

The Commission, by previous order, had fixed certain rates of the respondent. Subsequently these rates were increased by order of the Director General of Railroads. Upon relinquishment of Federal control the respondent continued to charge and collect the increased rates.

Held: The rates fixed by the Commission for an intrastate carrier may not be changed within three years without the consent of the Commission. This is especially true when Federal control has been relinquished.

COMPLAINT DOCKET No. 2359.

Report and Order of the Commission.

Luke Baker, for complainant.

George R. Heisey, for respondent.

BY THE COMMISSION :

This complaint is against the rates of the respondent company for the transportation of extract wood from various points in Pennsylvania to Newport, and alleges that said rates are illegal, unreasonable, unfair and excessive.

From the report it appears that the question of the rates for the service here involved was before this Commission and that the Commission, after hearing, determined and fixed said rate, as will be seen by reference to the proceedings in the case of the Oak Extract Company v. the respondent railroad company at Complaint Docket No. 1842.

The rates complained against, which are largely in excess of those fixed by this Commission, were put into effect by the respondent in compliance with an order of the Director General of Railroads, known as Order No. 28, and have been charged and collected by the respondent since June 25, 1918, without the approval of this Commission.

Under these facts, the case presented to the Commission raises the same question which we have decided in *New Jersey Zinc Company v. Central Railroad Company of New Jersey*, C. D. 2407, *infra*, page 278, and in line with that decision we again hold that neither the Director General of Railroads nor the respondent company is authorized to change a rate determined by this Commission, within three years of the date of such determination, without the approval of the Commission. Such approval not hav-

ing been obtained, we conclude that the rates complained of can not lawfully be collected by the respondent.

The contention of the respondent that these rates can not now be changed except in the manner prescribed by the Interstate Commerce Commission can not be sustained. If that Commission had any control over intrastate rates, which we deny, it was limited to the period of Federal control, and ended when the road was released from that control. This control has been offered as an excuse for many acts which we think are illegal and in direct violation of the sovereign rights of the Commonwealth, but the time has now come when it is imperative that the State shall assert its rights. No reasonable interpretation of the acts of congress or of the proclamation of the President can sustain the position contended for, that is that Federal control of an intrastate carrier continues even after such carrier has been turned back to its owners.

If the respondent desires and is entitled to change the rates established by this Commission, it must proceed in the manner prescribed by the Public Service Company Law, and for this reason we direct that the complaint be sustained and that an order issue to the respondent directing it to cease and desist from charging and collecting for the transportation in question, any rates in excess of those established by this Commission.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof :

Now, to wit, February 10, 1919, The Newport & Sherman's Valley Railroad Company is ordered and directed to cease and desist from charging and collecting for the transportation of extract wood any rates different from those determined by this Commission by its order of May 28, 1918, Complaint Docket No. 1842.

By the Commission,

WM. D. B. AINEY, *Chairman.*

JOHNSON BRONZE COMPANY *v.* NEW CASTLE ELECTRIC COMPANY.*Rates—Increase of—Breach of contract—Discrimination.*

It is not discrimination to charge different rates for substantially different service.

A rate determined by the Commission to be reasonable supercedes that fixed by contract. *Leiper v. B. & O. R. R. Co.*, ante p. 218, followed.

COMPLAINT DOCKET NO. 2542.

Report and Order of the Commission.

J. Clyde Gilfillan and *Robert K. Aiken*, for complainant.

Ralph J. Baker, for respondent.

MAGEE, Commissioner:

On March 29, 1916, the parties entered into a written contract to the effect that the complainant was to be supplied with electric current for power consumption for five years, at the rates then provided in the respondent's tariff. On June 1, 1918, the respondent put into effect a new tariff and another on November 25, 1918, both of which contained increased rates affecting all classes of consumers. Respondent gave complainant notice of the cancellation of the five-year contract and has been sending it bills for its consumption at the new rates. Complainant denies the right of the respondent to cancel the contract, disputes the reasonableness of the rate under the present tariff and asserts discrimination, alleging that a certain other consumer, the Standard Engineering Company of Ellwood City, enjoys a lower rate.

As to the charge of discrimination, it appeared at the hearing that the said Standard Engineering Company was being charged under a different schedule of the tariff and the testimony clearly showed that that company and the complainant received different services and therefore are properly classified differently under the provisions of the tariff.

As to the reasonableness of the new rates, the respondent offered testimony to the effect that the increased operating costs were larger than the revenue which the increased rates would produce with a similar volume of output and this was not seriously ques-

tioned by the testimony of the complainant, which was general in its nature.

Complainant's contention as to his rights under the five-year contract fall in the face of *Leiper v. Baltimore & Ohio Railroad Company*, 262 Pa. St. 328, *infra*, p. 218.

"It would be impossible for the Commission to enforce an equality of reasonable rates, except upon the basis that it is not bound by contracts previously entered into between a public service company and either a municipality, another corporation or a private individual."

The complaint therefore should be dismissed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, February 4, 1919, *It is ordered*: That the complaint in this case be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman*.

MATTHEW LONG *v.* LEHIGH TRACTION COMPANY AND WILKES-BARRE & HAZLETON RAILWAY COMPANY.

Practice and procedure—Complaints—Form of—Joinder of parties—Art. VI, Sec. 6, of Public Service Company Law construed—Res adjudicata.

Article VI, Section 6, of the Public Service Company Law requires that complaints "shall contain a concise statement of all material facts upon which complaint is founded." A complaint which improperly joins parties

as respondents, and which is couched only in most general terms, violates this provision of the law.

It appearing that the complainant had been permitted to intervene in an other case covering the same ground against the Lehigh Traction Company, the Commission held that its decision in that case was conclusive and dismissed the complaint.

COMPLAINT DOCKET No. 1633.

Report and Order of the Commission.

Matthew Long, for complainant.

George R. Bedford and *John J. Bigelow*, for respondents.

BY THE COMMISSION :

By a single complaint against the Lehigh Traction Company and the Wilkes-Barre & Hazleton Railway Company, couched in very general terms, to wit: "I believe the proposed increase in fares to be unreasonable, unwarranted and unnecessary; that they receive at least as much and in many instances many times higher fare per mile than steam roads charge; that their capital stock is fictitious, all water, no cash, their bonds nearly in the same category, having been sold far below par," the complainant proposes an inquiry into the reasonableness of rates of these two companies already effective.

To this an answer was filed in the nature of a demurrer: (1) That the said complaint improperly joins Lehigh Traction Company and Wilkes-Barre & Hazleton Railway Company for the reasons that no joint rates, schedules or tariffs have been filed by the two respondents jointly. (2) That if an increase of rates by each of the two joint respondents is complained against, then and in such event the said complaint should be segregated and not joined. (3) That the answer of each of said respondents to any individual increase of rates would differ materially in the essential facts and could not be treated jointly. (4) That the complaint is a recital of opinion and conclusion in violation of the Public Service Company Law and of the Rules of Practice adopted thereunder in that it does not contain a concise statement of all the material facts upon which the complaint is founded.

This Commission, on the complaint of Neal J. Ferry, et al., v. Lehigh Traction Company (C. 1594, 1595, 1596) (7 P. C. R. p. 198), filed before the effective date, has, after extended hearings and investigation, reached a conclusion with respect to the rates of that company. The complainant in the instant case appeared at the hearing in the Ferry case, was permitted to intervene, examine witnesses and offer testimony, and the decision of the Commission thereon is controlling, in so far as the Lehigh Traction Company is concerned, in the matter now before us.

Article VI, Section 6, of the Public Service Company Law, requires that complaints "shall contain a concise statement of all material facts upon which the complaint is founded." A copy thereof shall be served upon respondents who are required by the act to satisfy the complaint or to answer the same in writing. While strict formalities in pleading before this Commission are not desirable or required, some observance of orderly procedure in order to clarity of the issue involved, the procedure to be followed and the orders to be made is requisite. The evidence taken and report made in the Lehigh Traction Company cases, *supra*, and an inspection of the tariff filed by the Wilkes-Barre & Hazleton Railway Company, disclosed that there are no joint tariffs filed or in effect, and there are no reasons set forth either in the complaint or otherwise brought to the attention of the Commission why the usual and proper procedure in this case should not be followed.

It is quite probable that on petition the Commission could allow amendments to the subject matter of the complaint to be made, and permit the striking out the name of the Lehigh Valley Traction Company as respondent, but under the circumstances no useful purpose would thereby be served. The complaint having been filed subsequently to the effective date of the tariff filed by the Wilkes-Barre and Hazleton Railway Company, the burden of proof rested upon the complainant, and he has had his day in court in so far as his complaint related to the rates of the Lehigh Valley Traction Company.

In the circumstances the complaint should be dismissed, with leave, however, to the complainant to file a new complaint against the Wilkes-Barre & Hazleton Railway Company if he so desires.

ORDER.

And now, to wit, February 4, 1919, for the reasons set forth in the foregoing report, the complaint is dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

GEORGE L. NYCE *v.* DELAWARE VALLEY R. R. Co.

Common carriers—Operation discontinued without consent of Commission.

COMPLAINT DOCKET No. 2545.

Order of the Commission.

A. Mitchell Palmer, C. R. Bensinger, and Ralph J. Baker, for complainant.

AINEY, Chairman:

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and it appearing in respondent's answer, "that your respondent subsequently ascertained that under the law it was not possible for said company to arbitrarily discontinue operations."

Now, to wit, January 20, 1919, It is ordered: That the respondent, the Delaware Valley Railroad Company, shall not abandon its public service as a common carrier without having first made application to this Commission and securing an order authorizing such abandonment; and

It is further ordered: That jurisdiction of this complaint be retained by the Commission for the purpose of making such further order as may hereafter be required.

COUNTY COURT OPINIONS.

COMMONWEALTH OF PENNSYLVANIA, EX REL., WILLIAM I. SCHAFER, ATTORNEY GENERAL, PLAINTIFF, v. THE BELL TELEPHONE COMPANY OF PENNSYLVANIA, DEFENDANT.

Equity—Injunction—Motion to continue same—Rates—Increase of without approval of Commission—Federal control—Police power of State—Constitutional provisions—Jurisdiction of court.

The joint resolution of congress authorizing Federal control and operation of telephone and telegraph lines for the duration of the war, provides that nothing in the act, be construed to impair the police power of the several states. An increase of rates without the approval of the Public Service Commission is an unwarranted interference with the police power of the State in violation of the above named provision.

The President as commander-in-chief of the army and navy may seize and control the property of the defendant company for use in prosecution of the war, but the rates and tolls charged others for uses of the lines while under Federal control have no real relation to Federal use for war purposes. Hence, an attempt to increase the rates without the consent of the Commission is not an official act, and the representatives of the President are subject to the control of the court in such matters.

Injunction continued until final hearing.

Bernard J. Myers, Deputy Attorney General, and *William I. Schaffer*, Attorney General, for the Commonwealth of Pennsylvania.

J. L. Swayze and *Thomas Patterson*, for the plaintiff.

Rogers L. Burtnett, United States Attorney for the Middle District of Pennsylvania, for the United States of America.

In the Court of Common Pleas of Dauphin County. Sitting in Equity. No. 631 Equity Docket. Commonwealth Docket, 1919, No. 1.

KUNKEL, P. J., April 2, 1919:

The Attorney General has filed this bill in behalf of the Commonwealth and seeks thereby to restrain the defendant company

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from charging rates for the use of its lines within the State different from those approved by the Commonwealth's Public Service Commission. A preliminary injunction was granted and the case is now before us on a motion to continue the same. The defendant has filed its answer in which it denies that it has any control over its lines or is now operating them, except under the direction and orders of the Postmaster General, who has taken possession of and is operating them, and that the changed rates and toll charges are being enforced by him. It disclaims any responsibility for the operation of its lines under the new and unapproved rates. The jurisdiction of the court also is questioned in a plea filed by the United States Attorney.

The Postmaster General in taking and assuming the control of the defendant's lines and in operating its systems, acted under the proclamation of the President of the United States issued July 22, 1918, to the effect directing that the supervision, possession, control and operation of telephone systems shall be exercised by and through the Postmaster General, said "Postmaster General may enforce the duties hereby and hereunder imposed upon him so long and to such extent and in such manner as he shall determine through the owners, managers, board of directors, receivers, officers and employees of said telegraph and telephone systems." Acting under the authority thus conferred, the Postmaster General by an order known as No. 2495, issued December 12, 1918, directed that the rates for toll service over the defendant's telephone lines should be charged and computed according to a standard schedule set forth in the order, which rates were not approved by the Commonwealth's Public Service Commission as required by the Public Service Company Law (P. L. 1913, p. 1374), and were different from those approved and theretofore in force. The President's proclamation was issued pursuant to a joint resolution of Congress, approved July 16, 1918, which provides that: "The President during the continuance of the present war is authorized and empowered whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine, cable or radio system or systems or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control or operation shall

not extend beyond the date of the proclamation by the President of the exchange of the ratification of the treaty of peace. Provision is also made in the resolution for the payment of compensation to the persons affected for the use and operation of the systems. The resolution further provides that nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers or regulations may affect the transmission of government communication or the issue of stock or bonds by such system or systems." Thus it appears the President is authorized when he shall deem it necessary for the national security or defense, to take under his control and operate in such manner as may be deemed needful or desirable, for the duration of the war, the defendant's telephone system; and the duration of the war is practically defined to extend to the date when the President shall proclaim the exchange of the ratification of the treaty of peace. The time when he shall exercise his authority and the manner of its exercise is committed to his judgment and discretion. However, the period during which he may exercise his authority is limited and he may not in exercising it, impair or affect the lawful police regulations of the states.

The action of the President in taking possession, assuming control and supervision of the telegraph and telephone systems within the jurisdiction of the United States is stated to be not only under and by virtue of the power vested in him by the Federal resolution but by all other powers thereto him enabling. The Commonwealth contends that the powers thus conferred may not be exercised at the present time because the war during which they were to be exercised is at an end; that the resolution did not contemplate a change of defendant's rates and tolls by the President when authority was granted him to operate its lines; that the resolution of congress has been misconstrued, as it specifically provides against the impairment or change of existing laws of the states in relation to taxation or the lawful police regulation of the several states, and that the required approval of the defendant company's rates by the Public Service Commission is one of the Commonwealth's police regulations. The defendant takes issue on these propositions and insists that the President's power

to do the act complained of arises not only out of the resolution of congress referred to, but also inheres in his office as commander-in-chief of the army and navy, which no act of congress can constitutionally limit. It further objects to the proceeding as being one in effect against the United States which has not consented thereto. The controversy is therefore over the power of the President and Postmaster General to change the rates from those approved by the Public Service Commission of the Commonwealth and in force prior to and at the time the defendant company was taken into their control and operated by them; and also over the jurisdiction of the courts to interfere with them in so doing.

As has been said, it is averred and not denied that the officers of the company are not operating it or attempting to enforce the new rates and tolls, but it is contended on the part of the Commonwealth, that although not acting of their own motion but merely as a means and instrumentality, they are acting at the behest of the Postmaster General representing the President, and are thus assisting and abetting him in enforcing the changed tolls and to that extent they should be enjoined.

We have stated that the defendant company and the United States District Attorney also assert that the Postmaster General's power to change the rates which were theretofore adopted by the company and approved by the Commonwealth's Public Service Commission as required by law, is found in that provision of the Constitution of the United States which makes the President thereof the commander-in-chief of the army and navy.

Under the provisions of the Constitution there can be no question that the President of the United States is empowered as commander-in-chief of the army and navy to direct the movement of troops and to plan the campaign and to do everything necessary for the prosecution of war. It may be conceded for the purposes of this case, that he and the Postmaster General acting for him, have the power to take over and use the property and lines of the defendant company in the proper conduct of the war; to use them for governmental communications in connection with the prosecution of the war and to prevent or allow their use by others. The question, however, remains whether they are empowered

to use and operate the defendant's telephone system for any other purpose than such as the necessity of the occasion actually demands. It is self-evident that he may use it for all war purposes without changing the rates which the Commonwealth's Public Service Commission approved, because in the conduct of the war and in the exercise of his power as commander-in-chief of the army and navy, the rates and tolls chargeable to the public would be of no moment to him, inasmuch as he may use the defendant's lines and property by virtue of such power and under the necessity of the circumstances to the exclusion of the public. The rates and tolls charged others whom he may permit to use the lines while under his control would seem to have no real relation whatsoever, to his use of the system for all proper war purposes. Hence it would appear that his attempt to change the rates and enforce rates which were not approved by the State authorities is wholly outside of his power. If this be true, in so doing he is not engaged in an official act but is acting beyond his power. In this view of the case an injunction interfering with him from so acting would not amount to an interference with him as an official or with his official action and therefore would not be against the Federal Government. Where the authority to do the act complained of is challenged the suit is not against the United States. *Phila. Company v. Stimson*, 223 U. S. 605; *United States v. Lee*, 106 U. S. 196. If he be acting outside of his power he ought not to be permitted to seek refuge behind the office which he occupies and is administering.

But it is urged that the President is the sole judge of the necessity calling for the exercise of his war power and that his discretion is not reviewable by the courts. This proposition seems to be settled to the contrary in *Mitchell v. Harmony*, 13 Howard 115; *Little v. Barreme*, 2 Cranch 170. In the former case it was said: "Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it." If this be so as to the taking of property, it must be

equally so as to its use thereafter. However, be that as it may, we do not understand the law to be when the President has taken property under imperative and imminent necessity that he is the sole judge of the purposes for which he may use it. Whether he is using it for war purposes is a judicial question and depends upon the facts and circumstances of the particular case. When he attempts to use the defendant's lines and it does not appear that it is for a war purpose, but on the contrary appears to be for a purpose having no apparent or direct relation to the prosecution of the war, it must be shown we take it, that he is using it for a lawful and constitutional end. The necessity out of which his power arises does not appear in the present case. The fact that the necessity actually existed for changing the rates and charges and arose out of war conditions and that the change was in the interests of the national security and defense, does not appear. On the contrary, no necessity appears unless it be that of raising revenue to help the Federal Government compensate the defendant company for the use of its property. That is not a war purpose. The proviso to the congressional resolution shows that in the opinion of congress there existed no military necessity for changing the rates.

It may be conceded that the courts have no power to review the President's official discretion in operating the company for war purposes, but a different question is presented when it is claimed that in changing the rates and attempting to enforce the unapproved rates, he is acting beyond his powers. The question whether the power which he is exercising belongs to him is a question of fact determinable from the admitted purposes for which he is exercising it. It would hardly be contended that if he took possession of private property under what is called his war powers and used it for other than war purposes he was acting within his constitutional powers. To illustrate, if he took possession, under his war powers, of a citizen's residence, and used it by renting it to another for the purpose of revenue, could he justify the act under his war power? Surely he could not divert the property taken, from a war use to some other use. It would seem therefore that if he attempts to use the defendant's telephone system for a purpose which has no relation to the national defense or

security and if he may not, as President, because of his office, be subjected to injunction or to the process of the courts for so doing, still there is no reason why those who assist him and are within the jurisdiction of the courts, should not be prevented so far as they are amendable to judicial process.

We recognize the fact that there may be many cases involving the exercise of the President's war power where a court of equity would refuse to interfere because more harm than good might be done by interference, but we do not think that the present case is one of them. As we have already observed, the use by the public of the defendant's system and lines does not appear to have anything to do with the war or the national security or defense, and this is true, consequently, with respect to the rates chargeable for such use. They are wholly aside from the purpose for which the system was subject to be taken under government control and operation; and the system may be operated for such purpose independently of the rates chargeable to the public.

It may be suggested that it is the duty of the President while in control of the defendant's lines to so operate them as to result in the least loss to its business. This may be true, but would hardly justify the change of the rates chargeable to others for the use of the lines when, in the absence of any proof on the subject, the rates fixed by the Public Service Commission, whose duty it is to pass on the question, must be presumed to be fair, reasonable and adequate between the company and its patrons. If they were not, there is no doubt on applying to it the Commission would have afforded ample relief.

It is also asserted that the President of the United States and his Postmaster General were warranted in changing the rates approved by the State authorities by the Federal resolution which authorized the taking over, possession, control and operation of the defendant company's system of lines. It is important, therefore, to examine into the Federal resolution and to ascertain whether it will bear the construction which they have put upon it. The very resolution to which they appeal for jurisdiction of their act expressly provides that in acting under it, the State's police regulations shall not be impaired. Here is an express prohibition against interference with the rates of the defendant company; for it cannot be successfully disputed that the regulation of rates by

State law is a police regulation. The suggestion that the police regulations referred to in the proviso mean police regulations other than those relating to rates and tolls is not tenable. To so hold would be practically to nullify the proviso. We cannot understand a construction which would hold the reference to be to that which is remotely rather than to that which is closely allied to the subject of the legislation. What we have said with respect to the relation of the rates and tolls chargeable by the company to the use of the lines for war purposes and for the national security and defense, under the Presidential power is applicable also to the use of the lines under the Federal resolution, even if no effect be given to the proviso. It is quite clear that the resolution did not contemplate an interference with the rates and tolls in force at the time it was passed. If it had made no declaration on the subject we would not assume that it intended to authorize the operation of the lines for purposes other than war purposes, or contrary to the laws of the State. Here too then it is evident that the President and his Postmaster General are acting beyond any power conferred upon them by the Federal resolution. It is no answer then to say that they were engaged in an official act, representing the Government of the United States when they changed the rates and tolls chargeable for the use of the lines within the State by others, and may not therefore be interfered with or obstructed without the government's consent.

It appears therefore that the change of the rates chargeable to the public has no effective relation to the use of the defendant's system for war purposes or the purposes for which it was authorized to be taken over by the Federal authorities, either under the power of the President, as commander-in-chief, or under the Federal resolution.

The conclusion follows that neither the President nor the Postmaster General was acting officially in changing the rates and tolls, but they acted beyond the scope of their powers. In such case they are open to interference and prevention so far as lies in the power of the State courts, especially in the present case where their act amounts to a disregard of the Commonwealth's laws and is an attempt to do that which the defendant company itself could not lawfully do.

It will hardly be questioned that the Commonwealth of Pennsylvania has the power to enforce its own statutes, and to prevent their violation; or that this court has local jurisdiction to entertain the present bill for the purpose of preventing the violation of the order of the Public Service Commission. This right seems to be clear, Sec. 34, Act of July 26, 1913, P. L. 1429, Com. v. Order of Solon, 166 Pa. 38; and we think anyone who undertakes to disobey the order should show such a state of facts as plainly justifies his action.

For the considerations stated which we feel are developed only in part, we are induced to continue this injunction until final hearing, when the facts of the case may be fully shown and the questions which have been raised may be more thoroughly discussed and considered.

Accordingly the motion to continue is sustained.

I fully concur in the foregoing opinion and conclusion.

SAM'L J. M. MCCARRELL, J.

PUBLIC SERVICE COMMISSION.

CITIZENS AND RESIDENTS OF MT. HOLLY SPRINGS *v.* CARLISLE
AND MT. HOLLY STREET RAILWAY CO., CUMBER-
LAND RAILWAY CO.

Rates—Street railways—Increase of—Alleged to be excessive and unreasonable—Service—Inadequate and unsanitary.

The respondents increased their fares from seven to eight cents per zone. Complaint was made alleging that the increased rates were excessive and unreasonable, and that the service was inadequate and unsanitary.

It was shown that under the former rates the respondents suffered an annual deficit, and that practically no provision was made for repairs or depreciation.

The Commission approved the increased fares for a period of eighteen months from the effective date of the tariff and dismissed the complaint both as to rates and service with leave for the complainants to renew the same after the expiration of the above-stated period, burden of proof to remain on the respondents.

COMPLAINT DOCKET NO. 2316.

Report and Order of the Commission.

Caleb S. Brinton and Thomas E. Vale, for respondents.

BRECHT, Commissioner :

The Carlisle & Mount Holly Street Railway Company has been duly incorporated to transport passengers and freight between the borough of Mount Holly Springs and the Borough of Carlisle in Cumberland County. Its line of street railway is now operated under a lease by the Cumberland Railway Company which owns and operates another line extending from Carlisle to Newville, a distance of twelve miles.

Under a tariff effective June 12, 1917, the rate of fare on respondents' lines was increased from five to seven cents per zone. A complaint was filed at the time against the increase proposed but was subsequently withdrawn upon request of complainant. Some time thereafter another tariff was filed effective August 26, 1918, under which there was a further increase from seven to eight cents in the rate of fare.

A complaint has been filed by a number of citizens and residents of the Borough of Mount Holly Springs alleging that the increase from seven to eight cents in the fare per zone is excessive, unjust and unreasonable; and that the service rendered by respondent companies is "inadequate, insufficient, unsanitary and unsafe by reason of the character and condition of the rolling stock and road-bed." In their answer respondents have sought to justify the increase of fares by filing a statement of the receipts and expenses for the first six months of 1918, and denied that the service furnished is inadequate or that the cars are in poor condition, averring that an hourly schedule is in effect and that cars are at times obliged to leave Mount Holly Springs without any passengers.

It appears that on July 1, 1918, the Cumberland Railway Company failed to make payment of interest on its bonds, and an application to the court in September the company was placed in the hands of receivers on October 1, 1918. Shortly thereafter upon petition of the receivers appraisers were appointed by the Court of Common Pleas of Cumberland County to make an appraisal in due course of respondent's property. A copy of the appraisal

prepared for the court has been filed with this record and shows that materials and equipment in possession of the Carlisle & Mount Holly Railway Company used and useful for railway purposes have been valued at \$110,193.50.

Complainants offered no testimony upon any features of the complaint. The testimony of respondents was brief confined chiefly to receipts and expenses during the past four years, the admittedly poor condition of the roadbed especially between Carlisle and Mount Holly Springs, and the financial inability of the operating company to make the necessary improvements in track and rolling stock under a lower rate of fare. The case was submitted for determination on the record and testimony without briefs or argument from counsel for either party.

The Cumberland Railway Company through its treasurer submitted the following as a statement of the operating account taken from its books for the years given :

CARLISLE & MOUNT HOLLY STREET RAILWAY.

<i>Gross Receipts.</i>	<i>Operating Expenses and Interest.</i>
1913,....\$27,720 05	\$20,762 43
1914,.... 22,582 03	21,747 95
1915,.... 15,889 64	19,351 93
1916,.... 17,375 43	22,440 13
1917,.... 17,439 21	16,971 90
1918(x),. 5,770 15	9,440 58
(x) (1st six months.)	

CUMBERLAND RAILWAY.

<i>Gross Receipts.</i>	<i>Operating Expenses and Interest.</i>
1913,....\$22,291 06	\$36,428 01
1914,.... 22,690 84	48,243 46
1915,.... 25,372 46	37,690 08
1916,.... 26,148 31	42,963 98
1917,.... 25,990 33	38,117 13
1918,.... (Not given.)	(Not given.)
(x) (1st six months.)	

The bond indebtedness of the Cumberland Railway Company is \$405,000, of the Carlisle & Mount Holly Street Railway Company \$100,000. The bond issues bear five per cent interest. Re-

spondents also carry a floating debt of about \$50,000. It was testified that there has been no dividend paid during the past five years, and as far as could be ascertained by the treasurer of the company at no other time.

The evidence offered upon the condition of the cars, roadbed, and pole line, especially on the Carlisle and Mt. Holly line, is in effect that these are in poor condition and will require from \$15,000 to \$20,000 to put them in proper state of repair. The car line from Carlisle to Mount Holly Springs is seven miles long and the entire car line operated nineteen miles in length. The Mount Holly road is the older division, was built in 1900, and apparently little or nothing has been expended upon it for repairs and upkeep since then. The service on this line consists of one car operated on schedule every hour.

There is nothing appearing in the record or testimony to show definitely what effect an eight-cent fare has had upon the receipts of the operating company. The gross receipts under an eight-cent fare on the Carlisle & Mount Holly Railway for the months of September and October, 1918, which were submitted by respondent on request, are respectively \$1,406.14 and \$1,200.92. The average gross receipts per month on that same line under a seven-cent fare as shown in the operating account given above for the first six months in 1918, are \$961.69. While these figures are perhaps too general to furnish conclusive evidence, they serve to show that the eight-cent fare in the present instance has apparently not acted as a deterrent upon the car rider and has increased in a substantial manner the revenues of the company which the latter claims as absolutely necessary under existing conditions if the public is to have the benefit of proper and adequate service.

As shown by the testimony the operating expenses of the company from 1913 to the first six months of 1918, inclusive, do not include anything for accrued or annual depreciation, and comparatively nothing for necessary repairs and maintenance. The revenue account which was filed shows a substantial deficit every year since 1912 on the Cumberland railway, and during that period a total deficit of about \$4,500 on the Carlisle & Mount Holly road. The recent financial history of respondents beginning with the default in payment of interest on their bonds in

July, 1917, and ending with the subsequent appointment of receivers and appraisers, seem to confirm the claim of insufficient operating revenue under the former rate to conduct the business of these railways.

It is not clear why a street railway company which operates to and from a county seat a line of road seven miles long, whose property used and useful has been appraised by disinterested parties appointed by the court at \$110,000, whose bond and current obligations amount only to a little more than \$100,000, and which has never declared or paid a dividend, should have an average annual deficit over a period of time including years when business was normal. Whether this financial showing has been the result of poor management, an insufficient population to make a transit service self-sustaining, an inadequate rate of fare and defective zone system, or some other operating features, or a combination of some or all of these, is not disclosed by the evidence. The data submitted were incomplete and do not furnish an answer to this fundamental feature of the case.

After giving due consideration to all the facts and circumstances presented which seem to have a bearing upon the rate issue raised, the Commission has concluded that it would not be a wise administrative step in public service to find that the new rate proposed should not go into effect for the time being in this instance. An order will therefore be made allowing respondents to charge and collect the proposed eight-cent fare for a period of eighteen months from the effective date of their tariff, August 26, 1918, when upon application of complainants, the burden of proof to remain upon respondents, the Commission will again investigate the reasonableness of that rate under circumstances then controlling. The complaint with respect to service and condition of cars and roadbed, because of the financial stress in which the respondent companies now find themselves, will be dismissed with leave to complainants to file a new complaint after the expiration of the time which has been granted respondents to collect the proposed eight-cent fare.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon which report is hereby approved and made a part hereof:

Now, to wit, February 25, 1919, *it is ordered*: That the complaint in this proceeding be and the same is hereby dismissed with leave to the complainants to file new complaints in accordance with the determinations contained in said report.

By the Commission,

WM. D. B. AINEY, *Chairman*.

OSWAYO CHEMICAL CO. *v.* NEW YORK & PENNSYLVANIA
RAILWAY CO.

Railroads—Abandonment—Public Service Company Law—Jurisdiction of Court and Commission.

A public utility may not abandon its service without the consent of the Commission. A decree of a Court of Common Pleas authorizing abandonment under the Act of April 9, 1856, P. L. 293, cannot become effective until the Commission has approved the proposed abandonment.

COMPLAINT DOCKET No. 2649.

Report and Order of the Commission.

Ralph J. Baker and *F. D. Gallup*, for complainant.

Archibald F. Jones, for respondent.

BY THE COMMISSION:

The complaint in this proceeding alleges that the respondent railroad company is about to abandon its service and discontinue the operation of its line of railroad in Pennsylvania, and prays

the Commission to order the respondent to continue to render the public service in which it has been engaged. The answer admits that the respondent is about to discontinue the operation of its railroad and alleges that this Commission has no jurisdiction of the matter, for the reason that the railroad company has obtained from the Court of Common Pleas of Potter County a decree authorizing it to abandon the operations of its railroad in this county and to surrender any and all powers to operate a railroad, as contained in its charter, said decree having been entered after hearing held under the provisions of the Act of April 9, 1856, (P. L. 293).

From the testimony it appears that the line of the respondent company in Pennsylvania is about twenty-five miles in length, and that it has been operated continuously since 1904. Numerous manufacturing plants have grown up in the villages along the line and it cannot be doubted but that the abandonment of service will cause great inconvenience and financial loss to the inhabitants and the business concerns which are forced to depend upon it for a means of transportation. It appears that the operating revenues for some years have been less than the operating expenses as carried on the books of the company, but the complainant questions the correctness of the operating expenses by contending that they include considerable sums for interest which should not be charged to such an account. They also allege and it is uncontradicted that the respondent has not endeavored to increase its operating revenues by means of increased rates. In our opinion, the testimony fails to disclose that the railroad cannot be operated at a profit.

The Public Service Company Law makes it the duty of a public service company to furnish and maintain such service as shall, in all respects, be just, reasonable, adequate and practically sufficient for the accommodation and safety of the public, and it makes this Commission an administrative body for the purpose of carrying out the provisions of the act. We are of the opinion that under the broad powers given to the Commission it is our duty to regulate and supervise those actions of public service companies which directly affect the rendering of service to the public, and that no such company can abandon its service until this Commission has passed upon the question of whether or not such abandonment prejudices the public welfare. In reaching

this determination we are not unmindful of the provisions of the Act of 1856, under which the court of Potter County made its decree, nor are we in any way attempting to set up our judgment in opposition to that of the court. We believe, however, that the administrative decision of this question by the Commission must be obtained before the respondent can discontinue its service, and that the decree of the court cannot become effective until this Commission has approved the proposed abandonment. Under the facts presented to us we are unable to say that the proposed discontinuance of service is proper, or that it is necessary in the interests of the corporation, and an order will therefore be issued directing the respondent company to continue to render its public service until such time as it shall have obtained permission from this Commission to abandon that service; the tariffs in effect prior to February 28, 1919, to be effective until legally changed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, March 11, 1919, the New York and Pennsylvania Railway Company is ordered and directed to continue rendering its public service until such time as it shall have applied to and obtained from this Commission permission to abandon that service, the tariffs in effect prior to February 28, 1919, to be effective until legally changed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

WILLIAM A. ALLEN ET AL. v. BOYERTOWN ELECTRIC CO.

*Rates—Electric companies—Increase of—Alleged to be excessive
—Contracts fixing same.*

A contract providing for certain rates does not preclude the Commission from determining what are just and reasonable rates, and those fixed by the Commission supercede those contained in the contract.

New rates which, because of increased operating expenses, produce a lower net income than the old rates, are presumably not excessive, especially when no complaint was made that the old rates were unreasonable.

Complaint dismissed with leave to renew the same should operating expenses be materially decreased.

COMPLAINT DOCKET No. 2052.**Report and Order of the Commission.**

John B. Stevens, for complainant.

H. J. Cooley, and *Ralph J. Baker*, for respondent.

BRECHT, Commissioner :

William A. Allen and three other citizens of Boyertown, Berks County, filed a complaint alleging that the increased rates of the Boyertown Electric Company published and posted to become effective May 1, 1918, are excessive, unjust, and unreasonable; that the service by reason of frequent interruptions is inadequate; and that current for light and power is furnished to some consumers at a lower rate than that specified in the published tariff.

Respondent in its answer justified the increase of rates in its schedule on the ground that it is compelled to pay the Metropolitan Edison Company from which it obtains practically all its supply a material advance in the rate charged for current, and because there has been an abnormal increase in the cost of labor and materials within the past few years. It denied any inadequacy in the service, and admitted that under a former management contracts were made with some of the larger consumers under which lower rates have been charged than those set forth in its new tariff. And it was further averred that all of these contracts except two have expired and that where the con-

tract ceases or has ceased the parties must pay the regularly established rates under the tariff.

Counsel for complainants in his argument before the Commission stated and he has also so stated in his brief that the item of the complaint with respect to the inadequacy of the service would not be pressed at this time. That leaves for determination in this proceeding the two questions raised respectively with reference to discrimination and the reasonableness of the rates.

The allegation of complainants that some of respondent's patrons are charged a lower rate than that specified in its tariff is admitted by respondent as applying to a few of its larger consumers who were given a special rate under contract by a former management of the company. The principle involved in the issue here raised has been passed upon recently in several cases by this Commission and by the Supreme Court of the State. In *Ben Avon v. Ohio Valley Water Co.*, 4 P. C. R. 537; P. U. R. 1917c, 390, it was held by this Commission that *all contracts* prescribing rates for service, whether for a definite or indefinite period, do not *preclude* the Commission from determining what are just and reasonable rates. The Supreme Court in *Lepier v. B. & O. R. Co.*, 262 Pa. 328, 7 P. C. R. 218, uses this language:

"There seems to be no difference in principle between the case of a contract indeterminate and one that is determinate, nor is there any difference in principle between a contract with a borough, with a corporation, or with an individual. Any contract of this character, whether for a definite or indefinite period, must give way when its terms conflict with the rates fixed in the method prescribed by the Public Service Act of 1913."

In the case of *V. & S. Bottle Co. v. Mountain Gas Co.*, 261 Pa. P. U. R. 523, 104 Atl. 667, wherein it was passing upon a contract between a public utility and an individual, prescribing rates for a definite period, the Supreme Court held that such contract became inoperative from and after the effective date of the Public Service Company Law.

These decisions of our highest court bear directly upon the point here in issue. Under this interpretation a contract rate for service cannot be held to be valid where there is an express statute

requiring a public utility to charge and collect rates for its service in accordance with those prescribed in its regularly published tariff. An order will therefore be made directing the respondent to cancel forthwith all rate contracts which are in conflict with the schedule of rates and to charge all consumers only the rates established under its duly authorized tariff.

The respondent supplies electric current for light and power purposes to 716 consumers in Boyertown, and to 42 outside of that municipality who resides in several of the outlying towns and intervening territory. It also delivers current at the switch boards of a few small boroughs a mile or two distant for local consumption. It owns a small steam generating plant which is used now only as a reserve equipment in case of an interruption or suspension in the service. Its general supply of current is obtained from the Metropolitan Edison Company of Reading over two lines or routes at convenient points of connection with its distribution plant. The two lines of transmission are so adjusted by means of switch connections with separate units of the generating system that continuity of service is insured over one or the other circuit.

There were no estimates submitted to show what it would cost respondent to generate its own current. It was however contended on its behalf that because of the larger generating unit in the Metropolitan system it is cheaper to purchase current from the latter than to produce its own power. While this is not conclusive of that fact, yet it is safe to assume under all the circumstances present that the contention of the respondent is correct, and that it is in this instance at least a proper operating economy to purchase its current from the Metropolitan company.

The present management acquired control of respondent's property by purchase in July, 1916. No figures were offered to show what was paid for the property, nor were any estimates submitted which were designed to show the value of the property at present or at any time heretofore. It was shown that the entire property is carried on the books of the company at a valuation of \$98,883.96 under 19 general items including one for engines and generators at \$26,509.63. This valuation is made up, the assistant treasurer of the company testified, of an inventory of property taken when the present owners took possession of the plant which

amounted to \$75,103.67, and of money expended in additions and improvements made since then amounting to \$17,000. The authorized capital stock of the company is \$60,000 and has all been issued. There are no outstanding bonds but there is an indebtedness on current notes of \$17,500.

The gross receipts and total operating expenses including taxes under the old and new rates were shown by respondents to be as follows for the years 1917 and 1918:

1917—Old Rates—Actual Amounts.

Gross Receipts,	\$31,714 96
Total Operating Expenses,	22,733 29
Total net income,	\$ 8,981 67

1918—New Rates—Estimated.

Gross Receipts,	\$35,589 73
Total Operating Expenses,	30,103 22
Total net income,	\$ 5,486 51

The receipts for 1918 are based upon the business done by respondent in 1917 allowing an increase of ten per cent for new business, and were obtained by applying the new rates to that amount of consumption. The increase in revenue produced under the new rates and the assumed ten per cent increase in the volume of business were obtained by applying the old and new rates respectively to the consumption of actual current for the months of April and May, 1917, and 1918, which were taken as typical of the business for these years. The operating expenses for 1918 on that amount of business were submitted in detail and show that the increased cost of operation was due almost entirely to the higher rates which respondent is obliged to pay for its current, and to the abnormal increase in the price for labor and materials. A comparison of the operating figures given above shows a decrease in net income under the new rates of approximately \$3,500 in 1918 under existing economic conditions.

In the operating figures submitted there was no provision made for annual depreciation. The chief witness for respondent who seemed qualified to speak advisedly testified that the average life

of an electric plant like the one at Boyertown is about twenty years, that pole lines, transformers, meters, lamps and other elements of equipment must frequently be replaced in less time and that at least five per cent for annual depreciation should be allowed to be charged in the present instance. Under the evidence and the general experience of electric light and power companies the Commission is of opinion that the respondent should be allowed to set aside annually four per cent as a reserved depreciation fund.

As already noted there was no valuation of respondent's property introduced in evidence. The company apparently rested its case upon the abnormal increase in operating costs and a consequent decrease in its annual net income to justify the rates under its new schedule. It was shown that its net income was \$4,051.94 in 1914; \$6,756.00 in 1915; \$4,093.23 in 1916; \$8,981.67 in 1917; and \$5,486.51 (estimated) in 1918.

The reduced net income for 1918 under the new rates is evidently due mainly to the prevailing high prices ruling in operating cost. The gross receipts for that year show an increase under the new tariff of \$3,874.77, and the operating expenses an increase of \$7,369.93, leaving a net balance of about \$3,500 less than under the old rates of 1917.

The former rates were apparently satisfactory, and predicated upon that fact the net income derived under them could not be maintained to have been unreasonable or excessive. The companies' figures for 1918 show a net return for that year considerably lower than in 1915 and in 1917. It therefore would appear to be reasonable to presume in the absence of definite and conclusive evidence to the contrary, that the respondents should not be restrained, under existing operating conditions, from applying rates that are earning a lower net revenue than the companies obtained under the old tariff.

From the position taken by respondent in defending its action it would appear that the tariff under attack was filed to provide an emergency rate to continue in effect at least during the period of the high prices recently prevailing. Counsel for respondent so maintained in his brief. This in substance is implying that when the cost of labor and materials resume a normal and stabilized level there will be a revision of rates filed under a new tariff.

The Commission accordingly finds under circumstances now controlling that the complaint should be dismissed with the privilege accorded to complainants to file a new complaint, if they so desire, should the present rates be continued when expenses for operation and plant maintenance have fallen sufficiently to indicate that the net earnings of the respondent may show a material increase per annum.

An order will issue requiring respondent to annul all contracts prescribing rates for service at variance with the proposed tariff within thirty days after receipt of this notice, and dismissing this complaint with respect to the feature of rates without prejudice.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, February 25, 1919, it is ordered:

(1) That the Boyertown Electric Company, within thirty days from the receipt of this order, cancel forthwith all rate contracts which are in conflict with the schedule of rates, and charge all consumers only the rates established under its duly authorized tariff.

(2) That the complaint in so far as it pertains to the increase in rates effective May 1, 1918, be, and the same hereby is, dismissed without prejudice to complainants to file a new complaint, if they so desire, should the present rates be continued when expenses for operation and plant maintenance have fallen sufficiently to indicate that the net earnings of the respondent may show a material increase per annum.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF SPRINGFIELD CONSOLIDATED WATER COMPANY.

Water companies—Rates—Schedules—Revision of—Refusal of municipalities to pay for fire protection at rates approved by the Commission—Burden placed on individual consumers.

Where the various municipalities involved refuse to pay the fire protection charges fixed by the schedule of rates on file with and approved by the Commission, said rates being based upon a valuation of the water company's property made while determining a previous complaint as to rates, the Commission will permit the water company to amend its schedule of rates so as to place the fire protection charges upon the individual consumers when it is shown that the charge to each consumer will not, of itself, be unreasonable.

APPLICATION DOCKET NO. 2341—1919.

Report and Order of the Commission.

Wm. I. Schaffer and Montgomery Evans, for applicants.

Joseph G. Magee and Ernest Lowengrund, for City of Philadelphia.

Edwin M. Abbott, for Oak Lane Park Improvement Assn.

Wm. Righter Fisher, for consumers.

Howard M. Lutz, for Upper Darby Township, Dela. County.

Charles Sinkler and Charles W. Miller, for Lower Merion Township.

C. B. Collins, for Borough of Landsdowne.

James B. Robertson, for Borough of Darby.

See 6 P. C. R. 401, and 7 P. C. R. 49.

BY THE COMMISSION:

The Springfield Consolidated Water Company applied to the Commission under the provisions of Section 1 (f), of Article II, of the Public Service Company Law, for the approval of a

schedule of rates covering the various classes of service it renders and upon this application the Commission held a public hearing, after notice had been given to the consumers.

From the testimony it appears that after a thorough investigation of the affairs of this company the Commission established a schedule of rates to be effective after April 1, 1918, which was designed to return to the company a gross annual income of \$899,732, which sum was made up of \$262,500 for operating expenses, \$59,633 for depreciation, and \$577,599 as an annual return of seven per cent on the fair value of the company's property of \$7,203,320, and the estimated cost of improvements ordered \$1,048,100. The order establishing this schedule indicated that the annual return for fire protection service should be \$180,130, and for all other services \$719,602, and it established a rate for fire protection service based upon an annual charge to the thirty-six municipalities served by the company of \$7 per hydrant, and \$355 per mile of pipe four inches or greater in diameter, in each political subdivision where such pipe furnishes actual or potential public fire service.

These rates resulted in very large increases to the municipalities for fire protection service and a number of appeals have been taken from this portion of the Commission's decision, in which no question is raised as to the fairness of the valuation or rate of return, or allowances for operating expenses or for depreciation. The municipalities have, however, refused to pay the fire protection rates and have not included in their budgets the amounts necessary to meet them. The result of this is that the company has received for fire protection in 1918 only \$2,525.24, and there is due to it at this time about \$168,000 on this account, if it is to receive the annual revenue from this source fixed by the Commission. Operating expenses for the year have been about \$40,000 more than the estimate, due largely to unexpected increases in costs so that the annual revenue this year will be over \$200,000 less than the Commission's estimate of \$577,599.

The Commission has ordered this company to carry out a construction policy which is deemed necessary if adequate service is to be rendered to the important and rapidly growing communities which it serves, and it is not to be supposed that the company can economically finance this new construction, or in fact conduct its

ordinary affairs, if its revenue is to be thus depleted. The public service and the needs of the consumers make it our duty to fix charges which will enable this company to fulfill its obligations and which will be fair to its owners, provided such charges are reasonable to the consumers; and we are convinced that the gross revenue heretofore determined upon must be realized by the company.

Fire protection is a service which inures to the benefit of every one, whether he is a consumer of water or not, and, generally, the charge for it is met by taxation. When so met the amount paid by each taxpayer does not accurately reflect the benefit which he receives, nor does that system of raising the charge give due consideration to the benefits derived by those who are not taxpayers. The method has, however, been looked upon as being as fair as possible, under the circumstances, and has been generally adopted except where water is supplied by the municipality itself, in which case the consumer directly bears a large part of the burden of the fire protection cost. No matter what system is adopted, the fundamental fact remains that this service must be paid for, either by the municipality itself, through taxes, or by those who use water, through rates. As an administrative policy we must provide for the payment for this service, and if the municipality refuses to pay the just charges for a service which it performs for its citizens we are compelled to include those charges in the rates, provided always that the rate thus obtained is not an unreasonable charge for the services rendered.

In the present case, the refusal of the municipalities to pay the charges jeopardizes the company and its ability to render efficient service, and there is no way in which this danger can be removed, except by rearranging the rate schedule so that the consumers will pay the fire protection charges which the municipalities will not meet. The company cannot and should not be subject to the delay in payment which will accompany an attempt to collect from the municipalities the rates fixed. Before the litigation could be determined there would be owing it a sum variously estimated at between five hundred thousand and one million dollars, the loss of which would ruin the company and the payment of which in any one year would seriously embarrass the municipalities. In the interests of the consumers, the public and

the company, we therefore feel constrained to approve a new schedule of rates which will place upon the consumers the fire protection charges not assumed by the municipalities, if such schedule does not thereby impose unjust and unreasonable rates.

The schedule that we are asked to approve fixes an annual rate for fire protection of \$15 per hydrant, being the charge in effect prior to 1918, and rearranges the rates of the consumers so that each class is increased in varying amounts. In considering whether the charge to the consumer, under the proposed rates, will be just and reasonable, we are confronted with the problem of determining what is a reasonable charge for fire protection to the individuals who comprise a community. We know of no rule for computing this which will result in absolute justice; certainly apportioning the charge on a property valuation does not do equal justice to all. If the consumers desire to have the charge met in this way the matter is in their hands, since they as a whole make up the various municipalities. We have examined the results which will be reached by the proposed new schedule, with a view to determining the charges which will be placed upon the various classes of consumers, and are convinced that the individual consumer will not be required to pay more than a just charge for the service he receives in fire protection. The apportionment of the cost of this service seems to us to be as just and reasonable as is possible, under the circumstances here presented. The new rates will return the amount determined upon by the Commission divided as equitably as is possible among those served, and the charge to each consumer will not, in itself, be an unreasonable one, nor will it be more than is sufficient to fairly recompense the company for its expenditure for his benefit.

We therefore approve the application filed and direct that the schedule of rates therein contained be made effective on April 1, 1919, on one day's notice to the public and this Commission.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition of the Springfield Consolidated Water Company for the approval of a schedule of rates set forth in said petition, and having been duly heard and

submitted by the parties, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof :

Now, to wit, March 18, 1919, it is ordered: That the application of the Springfield Consolidated Water Company be and the same hereby is approved and that the schedule of rates contained in said application be and the same hereby is approved, and the company is authorized to make the same effective on April 1, 1919, by lawful tariff publication, upon one day's notice to the public and this Commission.

By the Commission,
WM. D. B. AINEY, *Chairman.*

WEIMER ELECTRIC LIGHT & POWER CO. *v.* METROPOLITAN
EDISON COMPANY.

Rates—Electric companies—Contracts fixing same.

Rates fixed by contract are void when different from those established by tariffs on file with the Commission, and which have been found by it to be reasonable.

COMPLAINT DOCKET NO. 2404.

Report and Order of the Commission.

Simon P. Light, for respondent.

BY THE COMMISSION :

The complainant is a public service company engaged in furnishing electricity in certain townships in Lebanon County, and in 1917 it entered into a contract with the respondent for a supply of electric energy for a period of fifteen years, at rates specified in the tariffs of the respondent filed with this Commission. In December, 1917, the respondent filed with the Commission a new tariff in which the rates for the service to the complainant were increased, and in September, 1918, the complaint in this case was

filed, alleging that the respondent company was bound to continue its service to the complainant at the rates contained in the above mentioned contract. The burden of proof was upon complainant who failed to show that the increased rates were unjust and unreasonable, no testimony having been produced before the Commission.

Under these circumstances, the Commission is forced to conclude that the contract rate is not binding upon the respondent company and that the only legal rate for the service rendered is that which is contained in the tariffs filed with the Commission, in accordance with the provisions of the law (*Lepier v. Baltimore & Philadelphia R. R.*, 262 Pa. 328, 7 P. C. R. 218). The complaint will, therefore, be dismissed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof;

Now, to wit, February 24, 1919, It is ordered: That the complaint in this case be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

PASSYUNK AVENUE BUSINESS MEN'S ASSN. *v.* PHILA. RAPID
TRANSIT CO., FRANKFORD & SOUTHWARK PHILA. CITY PAS-
SENGER RY. CO.

Street railways—Service—Change of routes

A change of routes which is advantageous to the general public and which tends to improve the character of the service will not be prohibited merely because some particular individuals are affected adversely.

COMPLAINT DOCKET No. 2539

Report and Order of the Commission.

C. Oscar Beasley and Edward B. Martin, for complainant.

Ellis Ames Ballard, for respondent.

BY THE COMMISSION:

The Passyunk Avenue Business Men's Association complained against a proposed change of service on what is known as Passyunk Line Route No. 81, of the Philadelphia Rapid Transit Company, which operates in the westward direction starting at Third and Dock streets, thence on various streets to Passyunk avenue, which begins at or near Fifth and South streets, then on Passyunk avenue to its terminus at Third street. Hearings were held by the Commission, at which testimony was offered by a number of men whose places of business are located upon the existing line on Passyunk avenue, which was designed to show that the proposed rerouting would cause great inconvenience and result in poorer service. It appears that the change will be a great accommodation to the general public, in that it will permit the handling of the traffic on a double-track line, with free transfers north and south, leaving a larger number of cars available for increased demands without diminishing the number required to maintain the present schedules. This contention is corroborated by the testimony of officials of the city and representatives of the 8,000 workmen who are employed at the plants situate near the western terminus of the Passyunk Avenue line.

We have carefully reviewed the testimony presented and after a consideration of all the facts are of the opinion that the complaint in this case cannot be sustained. It appears that the service on the Passyunk Avenue line east of Sixteenth street has been very much congested, and that some means should be adopted to relieve this congestion and make it possible for the cars to maintain their schedule. The plan proposed by the traction company seems to us to accomplish this purpose and to afford to the traveling public a speedier and better service than is possible on Passyunk avenue. In addition the riders will have the advantage of transfers in both directions, a condition which does not exist under the pres-

ent plan. While the proposed change will undoubtedly inconvenience some persons, we are of the opinion that the testimony discloses that it will result in much more adequate and sufficient service to the public as a whole, and we therefore direct that the complaint in this case be dismissed, and an order will issue accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, March 12, 1919, *It is ordered:* That the complaint in this case be, and the same hereby is dismissed

By the Commission,

WM. D. B. AINEY, *Chairman.*

LEHIGH VALLEY TRANSIT COMPANY *v.* NEW STREET BRIDGE
COMPANY.

*Contracts between two public utilities—Toll charges—Alleged to
be excessive—Complaint—Answer—Demurrer.*

A bridge company by granting to a transit company the right to use its bridge is discharging a public duty, and the contract fixing the rate of tolls is subject to review by the Commission. The fact that the contract is for a definite period not yet expired does not alter the above rule

COMPLAINT DOCKET No. 2372.

Report and Order of the Commission.

Thos. J. Perkins and *Butz & Rupp*, for complainants.

W. S. Kirkpatrick and *Geo. R. Booth*, for respondent.

Dallett H. Wilson, City Solicitor, and *Howard A. Lehman*, for
City of Bethlehem.

BY THE COMMISSION:

The complainant in this case alleges it is a public service corporation operating a system of street railways through and along certain streets in the City of Bethlehem, Pennsylvania, and among the lines maintained and operated by it is one extending along New street and across the bridge of the respondent; that the respondent is a public service corporation and was created and exists under the laws of Pennsylvania, and has erected, constructed, maintains and operates a toll bridge extending across the Lehigh river from the foot of New street in the City of Bethlehem, North Side (formerly the Borough of Bethlehem), to New street in the City of Bethlehem, South Side (formerly the Borough of South Bethlehem); that under date of the 2d of July, A. D. 1910, complaint entered into an agreement with the respondent under which the complainant was permitted to cross the said bridge with its cars. By the terms of said agreement, the complainant is required to pay to the respondent the sum of one-half cent for each passenger carried across said bridge in one direction, as well as the sum of ten cents for each car other than passenger cars operated across the bridge; that the agreement was entered into because of the public necessity of providing transportation between the Boroughs of Bethlehem and South Bethlehem and the use of the bridge of the respondent afforded the only available means of providing for such transportation; that the rates, tolls, and charges provided in said agreement, were not on the day thereof nor at any other time since said day, nor are they now, just and reasonable, but complainant was unable to obtain permission to use said bridge upon more favorable terms and entered into said agreement in order to provide the public services aforesaid; that the number of passengers carried by complainant across said bridge has greatly increased since the date of said agreement and the rates, tolls, and charges paid by the complainant to the respondent have increased from approximately \$6,000 to approximately \$20,000 per annum, and are likely to still further increase; that the rates, tolls and charges demanded, exacted and collected by respondent from complainant for the services furnished are unjust, unreasonable and unduly preferential and afford the respondent more than a fair and reasonable return on the fair value of the property of respondent employed in rendering the services; that the cost of

operating and maintaining the complainant's system has greatly increased and that the exaction by the respondent of the unreasonable rates, tolls and charges for the use of the bridge imposes an unjustifiable burden not only upon the complainant but also upon its patrons. We are requested to inquire into and regulate the services, rates, tolls and charges and to determine by specific order the maximum just, due, equal and reasonable rates to be hereafter charged, with prayer for reparation.

The respondent demurs to the complaint on the ground that this Commission is without jurisdiction for the following reasons:

"(a) The said complainant sets forth as part thereof a contract or lease between the complainant as lessee and the New Street Bridge Company as lessor for a term of years not yet expired and that said contract was entered into July 2nd, A. D. 1910, which was three and one-half years prior to the creation of the Public Service Commission of the Commonwealth of Pennsylvania."

"(b) That the relief prayed for requires the said Public Service Commission to abrogate or change the obligation of said contract contrary to the provisions of the Constitution of Pennsylvania and of the United States."

"(c) That the said contract upon its face is a lease between the New Street Bridge Company, lessor, and the Lehigh Valley Transit Company as lessee, calling for the payment of a rental on the part of said lessee in consideration of a grant of property rights heretofore conveyed by the New Street Bridge Company to the Lehigh Valley Transit Company, and that, therefore, the Public Service Commission has no jurisdiction to alter or abridge the rights accruing to the New Street Bridge Company under said agreement being the consideration for grants of rights heretofore made and completed on the part of the New Street Bridge Company in favor of the said Lehigh Valley Transit Company."

"(d) The said complaint makes no allegation of fraud, accident or mistake in connection with the procurement, execution or fulfillment of said contract (Ex. "A" of the complaint) but on the contrary it appears by the express terms thereof and upon the face of the complaint itself that said contract first became operative twenty-six (26) years ago, was from time to time modified in certain minor details by the parties thereto and is in full force and effect without question or complaint heretofore raised by the said Transit Company."

Counsel for the respondent argue that every public service corporation performs both public and private duties. The carrying out of its expressed functions with relation to the public are public duties, but performing acts and making contracts which are not a direct performance of the public duty imposed by its franchise are private duties, and on that side of its functioning the corporation is not a public corporation; that the arrangement made by agreement of lease between the bridge company and the transit company was, so far as the bridge company is concerned, the performance of a private duty. If by this contract the bridge company came into direct relations with the public and the contract related to public fares or tolls for services of the bridge company which the bridge company could impose upon and collect from the public, then it should be a public contract, and the performance on the part of the bridge company would be a public duty. But under the lease in question, the bridge company makes no charges of tolls against or upon the public. If the public is affected, the bridge company does not know it, nor can the bridge company control the effect upon the public if any such effect is produced by the contract in question. The only power which the bridge company could exercise in the premises was to make the lease or refuse to make the lease. As a private corporation the bridge company could not be forced to take on its structure the tracks or cars of the railway company, and the compensation for such taking is damages, rental, due compensation and not tolls, fares or rates as to which the administrative powers of the Public Service Commission extend.

To provide for the passage of the public over the river is the bridge company's plain duty, and in allowing the transit company to lay its tracks and operate its cars on the bridge is the exercise of its franchise rights and is one way adopted by it of discharging its duty to the public. That it could not be compelled to allow the transit company on its bridge is beside the question. As a public utility it did so, and thereby rendered a service to the transit company and the public. The transit company enjoys a special service different in kind and extent from that of the general public crossing the bridge on foot or by vehicles, but nevertheless it is a public service, rendered by the bridge company under its franchise

from the State. A bridge company, for example, could not be compelled to provide a structure that would carry motor trucks and busses heavier than those customarily used on the highways; but if it did build a structure for the use of a motor transportation company, it would be engaged in a public service when it allowed the company to haul passengers and freight over the bridge for a proportionate share of the fares and freight charges. In serving the motor truck company as is the bridge company here in serving the transit company, it would be serving it as part of the general public. While the services might be different in kind and extent, still they would be public services rendered by the bridge company in the exercise of its franchise through facilities provided by it and subject to the control and regulation of this Commission.

The parties here are not private persons dealing with things in which the public has no concern, but are corporations whose right and powers were created for public purposes, and the subject-matter of the contract is one which affects the welfare of the public. Such a contract, though unexpired and made for a definite term, we have held to be under the supervising power and control of the legislature and of the Commission to whom this power and control has been delegated. Accordingly the demurrer is overruled and the cause will be set down for hearing in due course.

(This report was prepared by Commissioner McClure and submitted by him for the consideration of the Commission, and since his decease was adopted as a Commission report.)

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had and the Commission on the date hereof having made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

And now, to wit, March 18, 1919, It is ordered: That the demurrer in the above entitled case be and the same is hereby over-

ruled and the cause is directed to be set down for hearing upon due notice to the parties.

By the Commission,
WM. D. B. AINEY, *Chairman*.

FRANK L. BOWERS, ET AL., v. SPRING HILL WATER COMPANY.

Water companies—Rates—Alleged to be excessive and discriminatory—Meters—Flat rates.

Rates that have been in force for a number of years without protest will not be set aside by the Commission in the absence of clear proof that such rates are excessive.

There being only a limited number of patrons without meters, the respondent was ordered to furnish them with meters and abolish its flat rate, and to discontinue its practice of allowing a flat rate to some of its metered customers.

COMPLAINT DOCKET NO. 1777.

Report and Order of the Commission.

H. S. Dumbaugh and Frank M. Hardin, for complainants.

Harry W. Byrne, for respondent.

ALCORN, Commissioner:

The complainants allege that the rates of the Spring Hill Water Company are excessive, extortionate and discriminatory; that it has failed to comply with the ordinance of the Borough of Point Marion, Fayette County, authorizing the said water company to enter upon the streets of the borough and lay its pipes; that it does not keep the fire hydrants and sewer system in good order and does not properly repave the streets over the openings.

The respondent in its answer denies these allegations.

The Spring Hill Water Company was incorporated October 31, 1899, with a capital stock of \$1,200, consisting of 24 shares of a par value of \$50.

The Borough of Point Marion by ordinance of September 12, 1903, authorized the water company to enter upon the streets of the borough and lay pipes. As a condition of this grant the borough required the water company to provide a sewer system for the use of the water consumers. The water company was not authorized by its charter to construct sewers but it did so in compliance with its contract with the borough, and the question of its right has not been raised. It was entitled to charge one dollar per foot front, no payment to be less than \$33, when connection was made with the sewer. The company was also required to supply the schoolhouse and the churches then erected or that may be erected and all municipal buildings with water free of charge, and to furnish at its expense and keep in order fire hydrants to the number of forty. It was to provide three fire hydrants immediately and for five years thereafter no charge was to be made for water supplied for fire purposes, and after the five years and for any additional hydrants the company agreed to charge \$20 per annum per hydrant. The ordinance also provided that all consumers should be metered and the rate should not exceed 50 cents per thousand gallons. The contract entered into in pursuance of this ordinance was to terminate in twenty years.

In addition to asking the Commission to fix a reasonable rate for water the complainants requested the Commission to order the water company to comply with the said ordinance and contract.

The complainants in their brief admit that the sewer system has been placed in proper condition and that there is no cause now for complaint on that account. The evidence showed that the respondent did not properly pave over the openings which it made in the streets to lay its pipes and that in some places there were depressions of as much as two inches. The company was required by ordinance to properly repave over any openings which it made. This is a matter that the borough council should attend to and does not require this Commission to make any order. The condition of the fire hydrants does not appear to be so serious as to require any action by the Commission. As only one or two were claimed to be out of order the fire service was not interfered with to any appreciable extent. If the respondent company does not put the fire hydrants in proper condition, the complainants can call

the matter to the Commission's attention and the company will be ordered so to do.

The important matter presented is as to the reasonableness of the rates charged the domestic consumers.

The respondent had not at the time of this complaint filed any tariff or schedule of rates with the Commission. The rates it charged were those that had been in existence since the company commenced operations about 1903. It is provided in Article II, Section 1, E, of the Act of July 26, 1913, as follows:

"That whenever any public service company shall file any tariffs or schedules under the provisions of this act or shall participate in any such tariffs or schedules so filed, the rates, fares and charges and the rules, regulations and practices, therein contained, as against such public service company, its officers, agents and employees, shall be deemed to be the legal rate, fare or charge and the rules, regulations and practices; otherwise, the published rate, rules, regulations and practices, if any, shall be the legal rate, fare or charge, rules, regulations and practices."

The rates which have been charged for some years past in the absence of any filed rates are the legal rates and the Commission is to determine whether those rates are just and reasonable. On March 15, 1919, after the hearing had been concluded the respondent filed a tariff and schedule of rates—the same as that which had previously been in force. The discrimination alleged is that some of the consumers are metered and others have a flat rate. The agreement between the company and the borough requires all consumers to be metered. It appears that there are only about a dozen without meters and who have a flat rate, and the respondent states that as these consumers had only one fixture and there was some difficulty in securing meters the company concluded to let them remain on the flat rate. There is no unjust discrimination however in classifying the various consumers, and if some are metered and some on a flat rate it does not create a discriminatory condition. It is considered however a more equitable way of determining what consumers should pay to measure the amount of water used and require payment on that basis. As there are only about a dozen consumers without meters the Commission con-

siders it proper that the company should install meters for those consumers and an order will be made requiring the company to do so. It has been the practice of the company to charge a flat rate of 50c a month to some of the metered consumers. This should be discontinued, as it is liable to produce a discriminatory condition.

The company has two rates for metered service—one for domestic consumers at 50c a thousand gallons; the other to the industrial at 20c. There is also a rate of \$90 a month to the Baltimore & Ohio Railroad for supplying its engines. There is also a flat rate of 50c a month for some of the consumers who have meters. The company did not read the meters but assumed that as these consumers had only one or two fixtures, it was not necessary to take a statement of the meters.

The complainants have not furnished any testimony from which a fair value of the respondent's property can be determined. They rest upon the data submitted by the company, and that consists of a statement of the property of the company, and an estimated value thereof, the revenue and expenses.

The capital stock of the company at present is \$16,800, and it was in evidence and not contradicted that this amount was paid in cash. The manager of respondent estimates the value of the investment, including the sewer system, at \$33,700. The company submitted a written statement of its property showing a value of \$50,641.75. The property consists of two pumps operated by gas engines of 26-horse power each, a reservoir of 800,000 gallons, a small purifying plant, 35,215 feet of water pipe from ½ to 8 inches, 2,300 feet of gas pipe from 2 to 4 inches, 21,225 feet of sewer pipe from 6 to 24 inches. There are 503 domestic consumers, 10 industrial consumers, including the Baltimore & Ohio Railroad, and 15 fire hydrants at \$20 a year each.

The income and operating expenses for 1914 to 1918, inclusive, are as follows:

<i>Year.</i>	<i>Receipts.</i>	<i>Expenses.</i>	<i>Net Income.</i>
1914	6,123.72	2,545.00	3,623.27
1915	5,696.69	2,924.70	2,771.99
1916	5,828.98	3,670.36	2,158.62
1917	5,631.73	3,452.77	2,178.96
1918	5,650.00	4,808.09	841.91

These receipts are from the sale of water. It will be noticed that while the revenue has declined expenses have increased very much since 1914. The company has at times paid dividends of 10%. The dividends have not been declared with any regularity. At the hearing of October 31, 1918, it was stated that no dividend had been declared for the year 1918. The expenses have very nearly doubled since 1914, and in 1918 had increased nearly \$1,500 over those of 1917.

The rate of 50c per thousand gallons charged to domestic consumers seems high. It was the maximum rate fixed by the ordinance of the borough, and the company apparently considered it had the right to charge the maximum price. While it would appear that this rate is high we have not sufficient data before us to determine whether it produces more than the fair return to which the respondent would be entitled. If we assume the statement of revenue and expenses for 1918 furnished by the company to be correct, and no evidence has been submitted to contradict it, the net balance of \$841.91 would not appear sufficient to produce a fair return upon the investment and provide for depreciation. This rate has been in existence since 1903 and no complaint had previously been filed against it. It was incumbent on these complainants to prove that the rate was unjust or unreasonable. This they have failed to do. Considering that in recent years the costs of operation have considerably increased this is not an opportune time to declare that a rate which has been in existence for some years without objection is unjust or unreasonable, unless the evidence is convincing. We are unable, under the evidence produced, to find that the rate is unjust or unreasonable, and the complaint as to the rate will be dismissed. An order will be entered requiring the respondent to provide meters for all the domestic consumers and to discontinue the practice of allowing a flat rate for metered consumers. Meters to be furnished and installed by the company at its expense, the cost of any plumbing necessary to prepare the pipe for the setting of the meter or of any valves or stop-cocks required shall be borne by the consumer.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containning its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof :

Now, to wit, March 31, 1919, the respondent, the Spring Hill Water Company, *Is ordered:*

(1) To furnish and install, at its own expense, meters for all its domestic consumers; the cost of any plumbing necessary to prepare the pipe for the setting of the meter or of any valves or stop-cocks required, to be borne by the consumer.

(2) To discontinue the practice of allowing a flat rate for metered consumers.

And *it is further ordered:* That as to the remainder of the complaint, the same be, and hereby is, dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF WEST PENN POWER COMPANY.

Public utilities—Crossings—Power of Commission to authorize the same.

The West Penn Power Company applied for a restraining order prohibiting the Bessemer & Lake Erie Railroad Company from removing the wires of the power company crossing over the tracks of the railroad company in West Deer Township, Allegheny County.

It appeared that the crossing had been constructed pursuant to a contract between the applicant, the railroad and the Western Union Telegraph Company, whose lines were also crossed. This contract provided that the approval of the Commission be obtained to the construction of said crossing, failing which it might be removed upon notice by the railroad.

No application having been made to the Commission for its approval of the crossing as required by the contract and the provisions of the Public Service Company Law, the prayer of the petition was denied with the suggestion that said crossing be allowed to remain until the Commission be given an opportunity to pass upon the advisability of a crossing at said point.

APPLICATION DOCKET No. 2212—1918.

Report and Order of the Commission.

David I. McCahill, for applicant.

T. C. Whitman, for Bessemer & Lake Erie Railroad Co.

BY THE COMMISSION:

In July, 1917, the West Penn Power Company notified the Bessemer & Lake Erie Railroad Company that it proposed to construct an overhead wire crossing in a manner specified in said notice, over the tracks of the railroad company and the wires of the Western Union Telegraph Company, at a point 3,041 feet north of the switch point of the siding of the Bessemer Coal & Coke Company in West Deer Township. Allegheny County and the railroad company filed a protest against said construction. Thereafter a contract was entered into between the electric company, the railroad and the telegraph company, which authorized the construction of a temporary crossing at the point named, in accordance with plans and specifications attached to said contract, and which provided for the termination of the contract upon notice by the railroad company. This contract clearly contemplated that the question of the location and method of construction of the permanent crossing should be submitted to this Commission by the electric company, and that the temporary crossing should be removed unless the approval by the Commission of a permanent crossing is obtained.

In accordance with this agreement the railroad company notified the electric company to remove the temporary crossing, and the petition in this case seeks to restrain the railroad company from exercising the right of removal which it had under the contract and prays the Commission to approve the crossing as it is constructed. The parties have agreed that the Commission shall determine the right of the electric company to secure a Certificate of Public Convenience authorizing the construction of the crossing over the property of the railroad company; it being the contention of that company that such a construction would amount to an exercise, by the electric company, of the right of eminent domain and a taking of the property of the railroad company.

From the record in this case it appears that the crossing in question is one of high tension electric wires over the tracks of the railroad company and the wires of the telegraph company, and that it is to be constructed for the purpose of enabling the electric company to fulfill its charter obligation of rendering service to the public. If it is constructed at the place and in the manner proposed, it will require the erection of three poles upon the right of way of the railroad company, it being the purpose of the electric company to cross at a place where there is no public highway over the railroad company's right of way. We are not called upon, at this time, to decide whether the method of construction adopted is a proper one or not, but simply to pass upon the right of the Commission to authorize the construction of a crossing by the electric company which will make use of the right of way owned by the railroad company.

In our opinion, the Public Service Company Law empowers the Commission to authorize such construction and to regulate the manner and place in which the crossing shall be made. Such authorization and regulation is not an exercise of the power of eminent domain which we have held was not granted to the electric company by the Public Service Company Law, but is a utilization of the supreme police power of the Commonwealth which has been placed in the hands of the Commission by the legislature. The crossing, if made, will not be for the benefit of the electric company, but for the benefit of the public to be served, and the use to which the property of the railroad may be subjected will be a public use of a public highway. We are convinced that the distinction which has always existed between the exercise of the right of eminent domain and the exercise of the police power, is apparent in this case, and that the legislature has lawfully authorized the Commission to subject the property of the railroad company to another public use such as is here contemplated.

We do not, at this time, pass upon the necessity or propriety of the construction of the crossing at this place or in the manner proposed. The electric company has not made an application to this Commission for the approval of the construction which complies with our rules and regulations. We suggest that the crossing which has been constructed under the contract be allowed to remain, so that the consumers of the electric company will not be

inconvenienced because of its failure to present a satisfactory application for the approval of the construction. As soon as such application is made to us we will pass upon the question of the necessity or propriety of the proposed construction, a question which the parties agreed should not be disposed of until after we had passed upon the matters which we have above discussed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania, upon petition and protest on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, March 17, 1919, *It is ordered*: That the application for a restraining order as prayed for in this proceeding be and the same is hereby refused.

By the Commission,

WM. D. B. AINEY, *Chairman*.

BEAVER VALLEY WATER COMPANY v. BOROUGH OF NEW
BRIGHTON.

Rates—Water companies—Municipalities—Jurisdiction of the Commission—Power of courts to fix rates under Act of 1874—Use of mains for domestic and industrial purposes—Fire protection.

Rates fixed by the Commission supersede those fixed by a court of common pleas under the Act of 1874.

The Public Service Company Law vests in the Commission full authority to regulate the rates for all service rendered by a water company, including service rendered to a municipality. The use of mains for industrial and domestic purposes does not exclude them from a charge for fire protection.

An order of the Commission which contemplated the payment by the borough for all service rendered to it by a water company, although not specifically mentioning each kind of service, required the borough to pay for all water used for street sprinkling, sewer flushing or any other municipal purpose; and all such service should be rendered on a meter basis.

COMPLAINT DOCKET No. 2436.

Report and Order of the Commission.

George E. Alter and Joseph A. Beck, for complainant.

Harry Calhoun, for respondent.

BY THE COMMISSION:

The petition of the Beaver Valley Water Company, in the nature of a complaint, alleges that pursuant to the order of this Commission made July 15, 1916, in Complaints Nos. 187 and 188, P. U. R. 1916, E, p. 962; 4 P. C. R. 1, 584, it did file a new schedule or tariff of rates effective January 1, 1917, which included all its service to the Borough of New Brighton, respondent. Said borough contends that the water company has no right to collect for the service rendered to it according to said schedule and for the amounts specified in said petition for the following reasons:

1. That the Court of Common Pleas of Beaver County had theretofore adjudicated, fixed and determined the rates which the borough should pay to the water company for the service rendered to it and which rates so fixed by said court have never been changed in any proceeding to which the borough was a party.

2. That the said schedule of rates providing for specified amounts for hydrant and for each mile of water main four inches or over are not lawful because they are not included in the rates adjudicated by the court, and for the further reason that said water mains are also used to conduct water for domestic and industrial purposes.

3. That the said rates did not apply to any water used for sewer flushing, water troughs, municipal buildings, or street sprinkling.

4. That the total amount collected by the water company under said new schedule of rates is greater than the sum allowed it by the Commission in its order.

At the time of the hearing counsel for the borough contends that the Commission, under the provisions of the Public Service Company Law, had no jurisdiction over municipal rates. At the close of the hearing it was agreed by the parties that the matter

should be disposed of by the Commission upon the evidence offered and the statements made by the respective counsel without briefs or further argument.

We are of the opinion that the provisions of the Public Service Company Law vest in the Commission full authority to regulate the rates of all the service rendered by a water company, including the rates for service rendered to a municipality, and that the Commission in its order above referred to did exercise its authority in that respect and said order was intended to and did include rates for any and all service rendered by the water company to any municipality.

We are further of opinion that the adjudication of respondent's rates by the Court of Common Pleas of Beaver County under the Act of 1874 has been superseded by the order of the Commission above referred to, the authority delegated to the courts to adjudicate the reasonableness of water rates of a water company under the provisions of the Act of 1874 now being vested in the Commission. The fact that the mains four inches and over, to which fire rates are applied, are used for conducting water for domestic or industrial purposes does not exclude such mains from those on which the charges for fire services are based. While the said order did not specifically mention all of the service rendered by a water company to municipalities, it did provide that no free service of any kind should be rendered and therefore the order of the Commission contemplated the payment by the borough for all services rendered to it by the water company, including sewer flushing, water troughs, municipal buildings and street sprinkling. All said service should be rendered on a meter basis and the borough should permit the water company to attach its meters to the flushing tanks or other facilities in such manner that the amount of consumption may be properly determined. If any difference of opinion should arise between the parties as to the method of metering or the basis of determining the charges and consumption of the service to the borough, which the parties cannot adjust, application may be made to the Commission therefor. The estimate of revenue returned by the schedule fixed by the Commission contemplated separate payments for each of the services rendered by the company, and therefore, the total amount produced will not exceed that fixed by the Commission in its former report and or-

der. An order will issue in accordance with the conclusions reached in this report.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, March 31, 1919, the respondent Borough of New Brighton, is ordered:

(1) To pay for all service rendered to it by the Beaver Valley Water Company, including sewer flushing, water troughs, municipal buildings, and street sprinkling.

(2) To permit the water company to attach its meters to the flushing tanks or other facilities in such manner that the amount of consumption may be properly determined.

By the Commission,

WM. D. B. AINEY, *Chairman*.

CITY OF NEW CASTLE, ET AL., v. CITY OF NEW CASTLE WATER COMPANY.

Service—Mains—Extensions—Duty of public service company to make same—Reasonableness of—Power of Commission to order same—Attempt to regulate same by contract.

The reasonableness of extensions by a water company under its charter obligations as a public utility cannot be made the basis of contractual relations, but is subject to the control of the Public Service Commission.

A public service company is required to make reasonable extensions at its own cost. What are reasonable extensions must be determined from the circumstances of each case.

COMPLAINT DOCKET No. 2450.

Report and Order of the Commission.

James A. Gardner, City Solicitor, for complainant.

Warren R. Voorhees and *H. K. Gregory*, for respondent.

RILLING, Commissioner:

J. F. Baxter and B. W. Thompson, complainants, allege that the respondent, the City of New Castle Water Company, refuses to extend its mains in order that they may obtain its service.

Clayton street, in New Castle, extends eastwardly and westwardly, is paved, and respondent has a six-inch main therein. Fifth street, commencing at Clayton street, extends northwardly at right angles therefrom. It is not paved, has a sewer laid therein, connecting with the sewer in Clayton street. Complainants own two new houses on the west side of Fifth street. The south line of the Baxter lot is 136 feet, and the south line of the Thompson lot 222 feet from the north line of Clayton street, there being one vacant lot between complainants. J. F. Baxter occupies his new house without any water service. The house of B. W. Thompson is vacant by reason of there being no water service therein. Both houses have bath rooms, and street sprinklers, besides the other ordinary service connection. Both complainants made application to respondent for its service, Mr. Baxter paying \$20, and Mr. Thompson \$25 at the time of making the application. It appears this was paid to cover the cost of laying one-half-inch service pipe from the street to the curb line, and is to be returned to complainants by allowing a discount on their future water rates. To serve both complainants would require the extension of respondent's main 268 feet.

By a contract made by respondent with the City of New Castle, it is agreed, inter alia, that respondent shall extend its main at the request of private consumers when the consumption from the extended main, during the first year after any such extension is made, shall pay at the rate of ten cents for each lineal foot of such extension, and a guarantee of such amount per foot from the city or other private consumers shall require respondent to make such extension. It is also agreed that extensions for fire service shall

be laid in like manner. Said contract expires January 1, 1922, and specifies both the flat and meter rates to be charged by respondent.

Complainants are not parties to this contract, and the city and respondent are not in accord as to the legal effect of its terms. We are of opinion that the reasonableness of the extension to be made by the respondent, under its charter duties as a public utility, like the reasonableness of rates, cannot be made the basis of contractual relations, but must be determined from the necessity therefor under all the facts in connection therewith.

Respondent filed a new schedule of rates, effective March 1, 1919, increasing the rates specified in the contract about twenty-five per cent. A complaint has been filed by the city, alleging these increased rates to be excessive and unreasonable, which complaint is now pending.

By an agreement made between the parties, respondent agreed to extend its main fifty feet from its Clayton street main. The remaining part of the main required to serve complainants was to be laid by and at their expense. This they were prepared to do at the time the sewer was laid in Fifth street, intending to lay the same on a shoulder in the sewer trench. Respondent would not consent to the laying of the main in the sewer trench, alleging that it was not proper practice for the reason that if a break should occur the water instead of coming to the surface, and thereby giving notice of the break, would sink to the sewer and follow the same, and might only be discovered after a long period. Respondent has a rule to lay its mains in the street eighteen feet distant from the curb line. This would not correspond with the location of the sewer in Fifth street. Respondent offered to lay fifty feet of its main from Clayton street, and then with the money paid by applicants lay a service from the end of said fifty-foot main to the curb line where it would place the meter to be furnished by complainants. From that point the complainants might carry the water to their dwellings in such manner as they determined. This is not satisfactory to complainants.

It appears from the evidence that the laying of the two-inch main from Clayton street will meet the needs of complainants as well as of other takers of water in said square. At the present time they are the only persons having dwellings fronting on Fifth

street. The cost of laying a two-inch main 268 feet in length at present high prices, according to an estimate made by respondent, would be \$254.40. Respondent contends, however, that said extension should be a six-inch main for the reason that when said street is improved and built upon, the city would require a fire hydrant placed thereon, somewhere on Fifth street, and that a six-inch main would then be needed, and it would, therefore, be necessary to duplicate a two-inch main if laid. The cost of the 268 feet of six-inch main at present high prices as estimated by respondent would be \$669.33. The expenditure of this amount respondent claimed would be an unwarranted and unreasonable expenditure for it to make.

The annual amount which each of complainants would pay for water at their new residence, according to the former flat rate service, would be \$18, and according to the new schedule, \$22.50. Should they desire to take service from respondent company by meter, they would be required to furnish the meter at their own cost.

The only definite proposition that respondent has made is to lay, at its own cost, fifty feet of the needed 268 feet extension. It was not definitely shown whether this was to be a two- or six-inch main. The locality in which complainants' two houses are erected is improving, and in the near future there will be other buildings erected along Fifth street requiring service from respondent. Under this state of facts is the extension asked for by complainants a reasonable one to be made by respondent?

The rule controlling, as this Commission has repeatedly held, is, that where a public utility serves a community, there is imposed upon it the legal duty to make at its own cost all reasonable extensions. What is or is not a reasonable extension can only be determined from the facts in each case. Where a utility assumes to serve a community it should consider its obligation to serve the entire district described in its charter and should so plan its affairs that it will be able so to do, within reasonable grounds. It cannot select and serve only the profitable patrons. Respondent has the right to collect a revenue sufficient to pay for operation, depreciation and a fair return upon its fair value. This protection and return enables it to maintain its credit and thereby se-

cure additional capital to make reasonable extensions and additions when and as needed.

We have no hesitancy in reaching the conclusion that under all the evidence in this case the extension asked for by complainants is a reasonable one and should be made by the respondent at its own expense. It should lay either a two-inch or six-inch main as it may itself determine. An order will issue requiring the laying of said main within sixty days from the date thereof.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, March 31, 1919, the City of New Castle Water Company *is ordered and directed* to serve the complainants with water by laying from Clayton street, northward on Fifth street, in the City of New Castle, for a distance of two hundred and sixty-eight (268) feet, either a two-inch or six-inch main, as it may itself determine.

And *it is further ordered*: That said main shall be laid within sixty days from the date of this order.

By the Commission,
WM. D. B. AINEY, *Chairman*.

THOMAS A. KENNEDY, ET AL., v. TROUT RUN WATER CO.

Rates—Water companies—Flat rates—Meters—Two families in one house—Tariff schedule ordered filed.

When there is but one meter in a house occupied by two families, the respondent may not charge a flat rate for each family.

Respondent was also ordered to file a tariff of rates, rules and regulations covering all classes of service.

COMPLAINT DOCKET No. 2611.

Report and Order of the Commission.

Thomas A. Kennedy, for complainant.

James W. Shull, for respondent.

ALCORN, Commissioner:

The complainants own a three-story house in the Borough of Duncannon. It has two entrances on High street, one through a reception hall leading directly to complainant's quarters, and the other a store entrance between two bulk windows leading to two rooms at present rented to a man and wife. These two rooms back of the store are used as living and sleeping quarters and for housekeeping purposes. Other rooms in the house on the third floor are rented to boarders. It is one building and has one meter.

For some years the Trout Run Water Company charged the complainants \$10 a year for water. This, according to the evidence, was a rate properly a minimum but in practice a flat rate which entitled the consumer to 50,000 gallons of water. The water company did not read the meter but assuming that no more than 50,000 gallons would be consumed, sent the complainants a bill for \$10 annually. This continued for some time, but was changed in the last bill sent and another flat rate of \$5 was added, making it \$15, because as the company claimed, it was entitled under its rules to charge this additional flat rate for what it called a tenement, meaning the two rooms in the rear of the store used for housekeeping.

The tariff filed by the company does not contain any rate for meter service, merely stating under the title meters "special rates."

It appears to have been the practice of the company to charge a minimum of \$10, allowing a consumption of 50,000 gallons, and an additional minimum charge of \$5 for a second family, allowing 25,000 gallons. If the complainants were charged under the tariff the rates according to the fixtures installed they would have to pay probably \$24 under the flat rates, so that the charge of \$15 would appear to be reasonable. However, as the property is metered, charging two minimum rates where there is the one meter, cannot be approved as a proper manner of regulations.

The water company should have read the meter and charged according to the amount of water consumed. An examination of the meter showed it to be in bad condition, very badly rusted, so that it evidently failed to register. It should be put in order by the company.

In our opinion the respondent is not justified in making two minimum charges for the one property when there is one meter, and the complaint in this case will be sustained and the company directed to charge the complainants the one minimum charge according to its previous custom.

The company is further ordered to file with the Commission within thirty days a complete tariff of rates, rules and regulations covering all the services rendered by it and posting and publishing the same in accordance with the act of assembly and the rules of the Commission.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, March 31, 1919, the respondent, the Trout Run Water Company, is ordered:

(1) To repair immediately the meter installed in the property of the complainants.

(2) To read the meter and charge according to the amount of water consumed.

(3) To make but one minimum charge, when there is but one meter, according to previous custom.

(4) To file, post and publish, in accordance with the Public Service Company Law and the Rules of the Commission, within thirty days from the date of this order, a complete tariff of rates, rules and regulations, covering all the services rendered by it.

By the Commission,

WM. D. B. AINEY, *Chairman.*

WILLARD HARTZELL, ET AL., v. BANGOR & PORTLAND TRACTION CO.

Traction companies—Rates—Increase of—Alleged to be excessive and unreasonable—Zones.

The respondent increased the number of zones on its line from three to four, increased its milk rates, and later increased its fare from five to six cents per zone. Complaints were made against each of the above changes.

The Commission found that the increased number of zones and the greater rates produced a net revenue barely large enough to pay the interest on the outstanding bonds, with no allowance for depreciation or salaries of officers. No dividends have been paid for the past several years. The complaints were thereupon dismissed, and the respondent directed to file on or before February 1, 1920, a statement of receipts and operating expenses for the year ending January 1, 1920.

COMPLAINT DOCKET NOS. 1526, 1969, 2305.

Report and Order of the Commission.

G. F. Young, for complainants.

J. W. Fox, for respondent.

RILLING, Commissioner:

The Bangor & Portland Traction Company extends from Main and First streets, in the Borough of Bangor, through East Bangor, Jacksonville, Mount Bethel, to the depot of the Delaware, Lackawanna & Western Railroad, in the Borough of Portland, all in Northampton County, a distance of 8.7 miles. It operates an hourly service on a zone basis, through a hilly country, with a maximum grade of 12%. The Delaware, Lackawanna & Western Railroad competes with respondent between Portland and Bangor, over a somewhat shorter route, operating two trains daily. Respondent has no power house, buying its power from the Pennsylvania Utilities Company. Originally, it had three 5-cent zones, viz:

Bangor to East Bangor,	2.70 miles
East Bangor to Mt. Bethel,	4.24 miles
Mt. Bethel to Portland,	1.76 miles

A new rate, effective July 1, 1917, was filed, making four 5-cent zones, viz:

Bangor to East Bangor,	2.71 miles
East Bangor to Johnsonville,	1.63 miles
Johnsonville to Mt. Bethel,	2.61 miles
Mt. Bethel to Portland,	1.76 miles

To this new schedule complaint was filed on June 22, 1917. While it was pending respondent filed a new schedule, effective March 25, 1918, increasing its milk rates, to which complaint was filed March 21, 1918. With these two complaints pending, respondent filed a further schedule, effective September 1, 1918, increasing its four 5-cent zones each to 6 cents. To this increase complaint was filed on August 13, 1918. The three complaints were heard together, respondent assuming the burden of proof, contending that the increased fares are necessary on account of the increased operating expenses and offered evidence to show operating cost and the extent of increase, as well as indicating the value of its property. The evidence produced confirms what is common knowledge, that respondent, like all other utilities, experienced a marked increase in operating cost, during the war and the severe winter of 1917-1918.

All of the capital stock of respondent's line was acquired about January 1, 1916, by the Northampton Traction Company, and since then has been operated by its officers. There is no track connection between the lines of the two companies. Respondent has outstanding:

First bond issue, 5 per cent.,	\$130,000 00
Second bond issue, 4 per cent.,	130,000 00
Capital stock,	130,000 00
Total capitalization,	<u>\$390,000 00</u>

Interest has been paid on all bonds but no dividends have been paid on capital stock. Operating expenses for two periods of thirteen months each, ending July 31, 1917, and 1918, were given, the first period covering twelve months' operation on the three-zone basis and one month on the four-zone basis, the second pe-

riod all under the four-zone basis. No evidence was furnished indicating increases made in earnings under the six-cent fares.

The net earnings for the thirteen months ending July 31, 1917, were \$13,232.35. For thirteen months ending July 31, 1918, \$14,931.93. In the operating costs during these periods nothing was included for salaries, the officers of the Northampton Traction Company having rendered the necessary service without receiving any remuneration therefor. Neither was anything included for depreciation.

Books indicating original cost of the respondent's line are not available and no original cost was shown. H. C. Dilliard, an engineer, who formerly rendered some service in connection with respondent's line, made a reproduction cost new estimate of respondent's property, without allowing anything for depreciation, amounting to \$387,398.66, making an average cost per mile of about \$44,500.

The character of the country through which respondent's line extends, the extent of the population served, the fact that it competes with a steam railroad, all tend to affect its earning power under any rates. It is not disputed that no salaries have, in recent years, been paid for its management, nor any dividends on its capital stock. Interest on its bonds at four and five per cent., amounting to an annual payment of \$11,700, is all that can be considered as the payment of any return to its owners.

We think the evidence in this case is sufficient to enable us to determine that the increased earnings effected through increasing the number of zones as well as increasing the zone and milk rates will not produce more revenue than the respondent has a right to collect.

The reproduction cost new of respondent's property, as made by its witness, without including anything for going value, is \$387,398.66, or about \$44,500 per mile. There was also some general testimony to the effect that the road could not be constructed at this time for less than \$400,000. If we were to use the amount of \$387,398.66, as the reproduction cost new and depreciate that sum 25 per cent., we would have the reproduction cost new less depreciation \$290,549, or about \$33,000 per mile. Common experience tells us that a street railway such as respondent's line, including its rolling stock and necessary equipment, cannot at this time be constructed for \$33,000 per mile.

The net revenue for one year ending July 31, 1918, under the four-zone basis, was \$13,783.32. If from this amount we were to deduct a proper sum for depreciation and salaries, we are convinced that the balance remaining is not sufficient to pay respondent a fair return. The small amount of increased revenue, while operating with four 5-cent zones instead of three, indicates to us that an increase of said zone fares from five to six cents and the increase made in respondent's milk rates, will not materially augment its net revenue.

Respondent's line extending from Bangor to Portland, serving the several communities reached thereby, is wholly dependent upon them for its support. It must collect its revenue from the public therein or go without. It is intended to be one of the factors that go to make the northern part of Northampton County a desirable place in which to live, and, through lack of revenue, it cannot render its service to the public, it naturally follows that either there is not sufficient demand for its service or its patrons do not pay enough for what they get. We are assuming, of course, in making this statement, that the company is efficiently and economically operated. What was a fair rate for a street railway became inadequate by reason of increased prices brought about through war conditions. This is as well known to the general public as to the utilities, and therefore the public must expect to pay increased rates for the service it accepts from a utility. In like manner as it pays increased prices for other needs. The dependency of respondent upon adequate patronage by the public should be recognized, otherwise the company and the public will both suffer, and if such lack of revenue continues it will result in a receivership and ultimately in the abandonment of respondent's line. No utility can or should be expected to continue operation at a continuous loss. The property of a utility which the owners have given over to public use has a claim upon such public which it serves for reasonable remuneration. On account of the public nature of the service rendered the State has limited its return. There is likewise imposed upon the public accepting this service the obligation to pay reasonable rates therefor.

Our conclusion is that under all the evidence the several complaints be dismissed; that respondent be permitted to collect its existing schedule of rates, and on or before February 1, 1920, file

with this Commission a proper statement of its receipts and operating cost for the year ending January 1, 1920, furnishing a copy thereof to complainant's counsel. After examination thereof, if they so desire, they may renew their complaints and, if renewed, a further hearing will be had, in which event the burden of sustaining the reasonableness of the rates will continue upon the respondent.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answer on file, and having been duly heard and submitted by the parties and the investigation of the matters and things involved having been had, and the Commission on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, April 15, 1919, it is ordered that the complaints in the above entitled cases be, and the same are, hereby dismissed; and

It is further ordered that the respondent, the Bangor & Portland Traction Company, on or before February 20, 1920, file a detailed statement of its receipts and operating costs for the year ending January 1, 1920, and furnish a copy thereof to counsel for the complainants, who, after examination thereof may renew their complaints, in which event, the burden of sustaining the reasonableness of the rates will continue upon the respondent.

By the Commission,

WM. D. B. AINEY, *Chairman*.

H. C. GIBSON, ET AL., v. THE UNION HEAT & LIGHT COMPANY.

Natural gas companies—Service—Failure of supply—Inability to serve all patrons—Discrimination.

A natural gas company which, as a result of the failure of its resources in gas, is unable to serve all its patrons is not guilty of discrimination against patrons not served when all reasonable efforts have been made to continue said service.

COMPLAINT DOCKET No. 2084.

Report and Order of the Commission.

James M. Galbraith, for complainant.

Trox & Parker, for respondent.

RILLING, Commissioner:

The respondent, the Union Heat & Light Company, was organized under the Natural Gas Act of 1885, on November 4, 1888, for the purpose of serving Harrisonville Borough and other communities in Butler and Mercer Counties. Its supply was originally secured from the Keister field, so-called, near Harrisonville. Later its charter was amended to permit it to supply other towns in Venango County and it also made a contract with the United Natural Gas Company for an additional supply of gas, which, by the terms thereof, is to be distributed only to towns therein specified. Harrisonville is not included. The contract further provides that the United Natural Gas Company may at any time terminate the same.

The supply of respondent at the Keister field has practically failed and as a result respondent's patrons, at Harrisonville and other places served from said source, have little or no gas. This was especially true during the severe winter of 1917-1918, and is likely again to occur. Many of the houses in Harrisonville and other points served by respondent have no other means of heating, lighting or cooking, except by natural gas. To use any other fuel would involve much expense in refitting their premises.

The complaint filed alleges that the service of respondent is inadequate, that it discriminates against the residents of Harrisonville by not supplying them with gas obtained from the United Natural Gas Company.

The complainants in this case are confronted with a condition that will, to a greater or less extent, present itself to other communities in western Pennsylvania enjoying natural gas service. Natural gas is one of Pennsylvania's great assets. For many years it has been supplied over an extended area for both domestic and industrial purposes. Its real value at first was little appreciated and it was wasted in a most profligate manner. All indica-

tions point to a fast decreasing supply thereof. It is apparent that it will be only by concerted effort, on the part of all who use natural gas, to curtail its consumption, that its continued supply may be extended. It is obtained by drilling wells of various depths, which can only be done, particularly at the present prevailing high prices, at considerable expense, and wells that are found to produce are generally limited in their supply both in amount and time.

The testimony adduced shows that not only the respondent but others have caused additional gas wells to be drilled in the territory within a reasonable distance of Harrisonville, but without securing any supply. It is evident that the supply of natural gas in that territory is being rapidly exhausted. Respondent endeavored to secure a supply of gas for complainants by contracting for same from other gas companies, but was unable so to do.

The efforts respondent has made to secure gas in the vicinity of Harrisonville, as shown by the evidence, convince us that respondent has complied with its charter duty to secure a further supply of natural gas for its patrons at Harrisonville and adjacent territory, and it has been unable to do so by reason of the failure of natural gas in that locality. To compel it to make a more extended attempt to secure such supply would impose upon it a greater expense than it should be called upon to make.

The gas supplied by the United Natural Gas Company to respondent for its patrons at Grove City and other communities, is found some distance northward of Grove City. The amount of gas received by respondent is insufficient to serve all of its patrons at Grove City, Harrisonville and other points, and is also decreasing. On account of its extent we are of opinion that by restricting the same to its Grove City patrons, respondent is not discriminating against complainants.

The complaint is therefore dismissed and an order will accordingly issue.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matter and things involved having been had, and the Commission having on the date hereof made and filed

of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, April 15, 1919, it is ordered that the complaint in this case be, and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

E. S. SWARTZ, ET AL., v. JEFFERSON ELECTRIC CO.

Rates—Electric companies—Alleged to be excessive and unreasonable.

Increased rates which produce a smaller net income than resulted from the old rates and which only partly make up for the increased operating expenses are not unreasonable. The new rates were approved for a period of one year, at the end of which time a revised schedule shall be filed, or cause shown why the present schedule should be continued.

COMPLAINT DOCKET NOS. 2399, 2415.

Report and Order of the Commission.

W. B. Adams and G. M. McDonald, for complainants.

Ralph J. Baker, for respondent.

BRECHT, Commissioner:

E. S. Swartz, et al., residents of the Borough of Punxsutawney, Jefferson County, and the Mercantile Bureau of Reynoldsville Chamber of Commerce, of the Borough of Reynoldsville, Jefferson County, have each filed a complaint against the Jefferson Electric Company. Complainants allege that the increase in rates posted and published for electric service in their respective boroughs, effective October 1, 1918, is unjust and unreasonable, and pray the Commission for various reasons enumerated somewhat in detail that an order be made to restrain the respondent from putting the proposed rates into effect.

In its answer respondent avers that its new rates as filed are just, reasonable and fair; that it has been found necessary to ad-

vance certain rates charged for electric service to meet the steadily increasing costs of operation, and to maintain an adequate service for its patrons; that because of high operating expenses during the past year the company has incurred a deficit in its business at Reynoldsville; and that as long as present conditions prevail the proposed increase will not be sufficient to produce a net income in respondent's business in that municipality.

The two complaints by agreement of the parties were heard together, and the issue raised has been disposed of in one proceeding.

The Jefferson Electric Company supplies electric service to the public in the Borough of Punxsutawney and surrounding territory in the Borough of Reynoldsville and adjacent territory, and in the country intervening between the two municipalities. It has, however, been operating in the Borough of Reynoldsville only since November, 1917, when it acquired control by purchase of the property and franchises of the Reynoldsville Electric Company which had been furnishing service in that municipality.

A comparison of respondent's tariff schedules shows that the rates under attack have been increased one cent per kilowatt hour for substantially the same volume of consumption in general and commercial lighting, and a fraction of a cent for certain classes and features of power service. The rate for commercial lighting which appears from the testimony to be the principal ground of complaint has been advanced under the new tariff from 15 to 16 cents per kilowatt hour for the first 30 hours of maximum demand, and from 5 to 6 cents per kilowatt for all excess current. In moderate size power current the increase in the rate has been from $1\frac{1}{2}$ to 2 cents per kilowatt for all excess above two periods of 40 hours' maximum requirements; and in the large power service there has been an increase of $\frac{1}{4}$ of a cent for energy charge upon all power used.

In a special clause under each class of service the tariff further provides that charges for electric service shall be increased fifteen per cent. on the gross amount of all bills rendered; that this additional charge shall be known as "War Surcharge," and shall continue for one year and thereafter until otherwise changed. The evidence does not show whether the complaint is more especially directed against this larger increase imposed as a war charge, or

whether the increase of the rates per kilowatt hour is also regarded as unjust and unreasonable. Apparently both these features of the tariff are meant to be included in the complaint.

Mr. E. S. Swartz was the only witness who offered testimony on behalf of complainants. The burden of his complaint seemed to be against certain rates under a former tariff which he contended were not equitably applied to his service when compared with the amount charged under the same classification to a neighbor druggist. He estimated that under the increase now proposed his annual cost of consumption would be approximately 20 per cent. higher. He admitted that the cost of labor and the scale of wages were materially increased during the past few years, and that in some instances men are still paid from thirty to forty per cent. more than before the war. Bituminous coal, he testified, can be bought at Punxsutawney at \$3 per ton delivered in the bin. He further stated he wanted respondent to have the benefit of a reasonable increase in the rate sufficient to cover the cost of its tangible assets, and to pay a good return on its investment, but he thought that the increase now proposed was unreasonable.

In its exhibit showing detailed production cost for the year 1918, the respondent sets forth that it paid \$3 a ton for coal during the first eight months of the year, and \$3.50 the remaining four months. The general manager of the company testified that there is a floating supply of coal from country banks that is irregular in quantity and inferior in quality which can be bought at a lower price. But he maintained that the coal from that source is not sufficient to furnish an adequate supply upon which respondent can rely to keep up the continuity of service which is necessary in an electric plant. For that purpose coal must be bought in large quantities and stored within easy access of the power house in order that the questions of the company may be protected against the usual exigencies of railroad deliveries of coal. The witness further stated that when coal can be bought for less in the market than the company is now paying, the consumer will get the benefit of a reduction in the rates accordingly. No evidence has been put in possession of the Commission which successfully controverts the essential features of the foregoing statement with respect to the conditions under which coal must be bought and stored by respondent.

There were no figures submitted to show the value of respondent's property. The various tabulations offered were prepared by the auditor of the company and deal exclusively with operating data. From these comparative statements it appears that the net income of the Jefferson Electric Company in 1913 was \$21,804.86; in 1914, \$24,213.92; in 1915, \$24,405.86; in 1916, \$26,952.05; in 1917, \$28,327.34; in 1918, new rate \$24,828.28; and in 1919 (estimated), will be \$16,478.98. These figures show that the proposed new rate based on the business and operating expenses, including taxes of 1918, produces a net revenue of but 77.6 per cent. of the amount produced under the former rates in 1917, and 95.1 per cent. of the net income in 1916. The estimated net revenue for 1919 shows a still more material reduction in the company's earnings when measured by the receipts obtained in normal years under the old rates. Figures from the Reynoldsville district show a deficit in operations since respondent acquired that property in 1917, and are not included in the statement of income given above.

During the three months in 1918 when the new rates were in effect they produced an additional revenue of \$1,175, or at the rate-making allowance for different periods of the year, of about \$7,000 per annum. Against this additional revenue of \$7,000 there is an increase in operating expenses of about \$11,000 due chiefly to the increased cost of producing current, the expense of promoting new business, and the general advance in the cost of labor and plant maintenance. The additional revenue earned by the increased rates is therefore apparently more than absorbed by increased operating expenses, and tends to show that business for the year 1918 will produce a net income below that secured by the company under the former tariff.

It was contended by compliants and constituted their main argument against the proposed increase of rates that respondent should not pay over \$3 a ton for coal. The statement of its auditor shows that respondent in 1918 used 4,875 tons of coal, for which it paid at the rate of \$3 per ton for 3,125 tons, and \$3.50 for the balance. If it be conceded that coal could have been bought for 50 cents a ton less it would have reduced operating expenses approximately \$850 for that year. The total operating expenses for 1918 were given as being \$48,298.22. Under those

circumstances a reduction of about one thousand dollars a year would not materially affect the rates charged for service were that amount saved in the price of coal. Hence it would appear that a lower price of fifty cents per ton for coal would not of itself afford substantial relief to complainants.

The net revenue of respondent given for the past six years shows that the ratio of gross receipts to operating expenses was considerably less in 1918 than in 1917 and in the years immediately preceding when business conditions were normal. Where the rate of return has been a reasonable and proper one, a public service company should be allowed about the same net income under new operating conditions that it enjoyed when its rates and service were accepted as satisfactory by the public which it served. In the present instance there is nothing in the record or evidence which shows why the respondent should not be permitted to increase its gross receipts under the high prices presently ruling and seek to obtain substantially the same amount of net revenue now that it earned in normal times. If a utility is expected to render proper and adequate service under abnormal conditions in business the balance between gross receipts and proper operating expenses must be maintained at approximately the same level as was found proper and necessary under normal conditions.

Complainants are assured that the proposed tariff is designed primarily to provide emergency rates. This purpose finds some support in the tariff itself. The special clause imposing an increase of 15 per cent. on all bills rendered is defined as an emergency measure to be withdrawn after one year or as soon thereafter as business conditions will warrant. It was also submitted in the pleadings of respondent that the increase in certain rates was made necessary by reason of prevailing high prices, and intimated during the hearing and advanced in the argument of counsel that when operating costs approach a normal level a revised tariff would be duly filed.

The Commission accordingly finds that under all the facts and circumstances appearing in the evidence the complaint should be dismissed, and the respondent permitted to put the proposed rates into effect for one year from the date of the issue of this report and order; and further that respondent should be directed to file

a revised schedule of rates at the expiration of that period, or appear before the Commission and show cause why a revision of its tariff under proper operating economies could not be made under conditions then existing. An order will be made to this effect.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had, and the Commission on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, April 15, 1919, it is ordered that the complaint in this case be and the same is hereby dismissed, and the respondent is permitted to put into effect the proposed rates for a period of one year from the date of this order; and

It is further ordered that respondent shall file a revised schedule of rates on or before April 15, 1920, or appear before the Commission and show cause why a revision of its tariff under proper operating economies could not be made under conditions then existing.

By the Commission,

WM. D. B. AINEY, *Chairman.*

EDWARD P. BLISS, OLIVIA A. ATCHISON AND CHAS. S. QUINN *v.*
SPRINGFIELD CONSOLIDATED WATER COMPANY.

*Meters—Installation of—Interior plumbing—Rates—Alleged to
be in excess of those ordered by Commission.*

The respondent had been ordered to install meters for the complainants at its own expense. Complainants contended that under this order the entire expense of installing same should be paid by respondent. It was also contended that the rates of the respondent did not conform with the previous order of the Commission.

Held: The rates were in conformity with the order of the Commission. The cost of valves and alterations in the interior plumbing should be paid for by complainants; the respondent must bear the expense incidental to connecting meters with pipes.

COMPLAINT DOCKET NOS. 2602, 2603 AND 2604.

Report and Order of the Commission.

Edward P. Bliss, for complainants.

Montgomery Evans, for respondent.

BY THE COMMISSION:

The complainants charge that the Springfield Consolidated Water Company does not comply with the order of the Commission as to the installation of meters and as to the rate to be charged these complainants pending the installation of the meter.

The Commission in its order required the respondent to install meters for the complainants at its expense. The complainants contend that under this order the respondent should pay all of the expenses incurred in the installation, including the cost of any valves or any alterations necessary in the interior piping in order to accommodate the meter. By installation the Commission meant the setting of the meter, that is, the insertion of the same into the pipe. The piping, with the necessary valves for control and operation form part of the interior plumbing. Any work necessary to arrange the pipe for the installation of the meter and the necessary valves or cocks should be at the expense of the patron or property owner. This is not included in the installation of a meter in accordance with the order of the Commission.

It appears that in the correspondence between the respondent and the complainants the company took the position that it was not required to do anything more than deliver the meter upon the premises. In the answer however it admits its error and is now prepared to deliver the meter and do the actual connecting into the piping in accordance with the Commission's definition of what is meant by installing a meter. In view of this the complaints in this respect will be dismissed.

As to the rate to be charged prior to the installation of the meter the respondent has complied with the order of the Com-

mission. The Commission ordered the respondent to furnish meters to all consumers, and until the meter was furnished reductions were to be made in the flat rates comparable to those provided for in the meter rates scheduled. In making this comparison the Commission divided the consumers into three groups, the third group approximating 2,605 consumers, paying from \$18 to \$25 per annum would not be changed. These complainants are in this third group. The charges made by the respondent are assessed in accordance with the schedule filed by it and was approved as being in compliance with the Commission's report and order of April 8, 1918. The complaints as to the rate will therefore be dismissed.

Charles S. Quinn, in his complaint, alleges that as the company refused to pay the expense of the installation of the meter he was compelled to do so and submits a bill of \$9.48, claiming that the company should refund to him this amount. The bill is not itemized and it is impossible to tell how much was incurred in the actual installation of the meter, according to the order of the Commission. This complainant should furnish the respondent with an itemized bill showing the actual work done in setting or coupling the meter to the pipe. It would then be the duty of the respondent to pay so much of the expense as was incurred in the installation of the meter according to the Commission's interpretation. An order will be made dismissing these complaints.

ORDER.

These matters being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, April 22, 1919, It is ordered: That the complaints in these cases be, and the same are, hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF THE SCHUYLKILL RAILWAY COMPANY.
BOROUGH OF ASHLAND AND MAHANAY CITY *v.* SCHUYLKILL RAIL-
WAY CO.

Rates—Increase of—Service—Transfers.

The respondent increased its rates from six to seven cents per zone. Complaint was made against this increase but before the Commission rendered its decision, the respondent filed a new tariff increasing its rates from seven to eight cents per zone. Complaint was also filed against this increase.

The Commission held that the respondent had failed to meet the burden of proof devolving upon it and ordered the seven-cent rate discontinued. The respondent thereupon applied for a rehearing on the first complaint. This rehearing was granted but respondent was ordered to charge but six cents per zone pending the outcome.

In the meantime, the Borough of Mahanoy City complained of the service of the respondent and asked for certain transfer privileges.

The rehearing and all the complaints were heard and disposed of together.

It was shown that the operating expenses of the respondent had increased and its net revenue decreased in the past few years. Its net revenue was not sufficient to provide for taxes, depreciation and fair return. It was also shown that that the terrain over which respondent operated presented unusual difficulties which resulted in increased expense. Without making a valuation therefore, the Commission permitted the respondent, upon one day's notice, to increase its rates to eight cents per zone and order seven tickets sold for fifty cents, the rate to be in force until June 1, 1920. The complaints as to rates were then dismissed.

The complaint relating to transfer privileges was dismissed until the Borough of Mahanoy City granted permission to respondent to lay additional tracks connecting its lines.

APPLICATION DOCKET No. 2208—1918.

COMPLAINT DOCKET NOS. 1582, 2166 AND 2133.

L. E. Enterline, M. J. Ryan, C. B. Miller, and W. S. Snyder,
for complainants.

Chas. A. Snyder and A. L. Schade, for respondents.

ALCORN, Commissioner:

These complaints and application involving the same question will be treated as one. They were heard together. In Complaint 1582 the Commission determined that from the evidence then submitted the increase of fare from 6 cents to 7 cents was not justified and directed the Schuylkill Railway Company to restore the 6-cent rate for each zone on its lines. This conclusion was predicated in large part upon the fact that the respondent had failed to meet the burden of proof imposed upon it by statute. Before this decision was rendered the railway company had filed a new tariff increasing the fare from 7 to 8 cents per zone. One of the complaints now under consideration is against the increase to 8 cents. On October 15, 1918, the respondent was ordered to cease charging any rate in excess of 6 cents for each zone pending the application for a rehearing in Complaint 1582. This order was made because the Commission had on July 2, 1918, determined that the 6-cent rate of fare was just and reasonable, and the railway company could not under the provisions of the Public Service Company Law within three years increase that rate without the approval of the Commission. The railway company having shown to the Commission that if given an opportunity it would present evidence which would tend to prove that it was entitled to charge the 8-cent rate, on November 12, 1918, a rehearing in Complaint 1582 was granted. The railway company on November 22, 1918, filed an application requesting the Commission's approval to the establishment of an 8-cent rate for each zone and ticket books of 13 tickets for \$1. This application and the complaints above referred to were then consolidated for the purpose of determining what was the just and reasonable rate of fare which the company was entitled to charge.

The Schuylkill Railway Company was incorporated July 20, 1903. It acquired by deeds the Mahanoy City, Shenandoah, Girardville and Ashland Street Railway Company, the Ashland, Locustdale and Centralia Electric Railway Company, and the Lakeside Railway Company and by lease the Schuylkill County Railway Company. It operates under three divisions—Mahanoy, Shenandoah, and Lakeside. The total mileage is 35.67 miles. The respondent operates over the Eastern Pennsylvania Railway Company lines from St. Clair to Pottsville. It has capital stock of

\$400,000 outstanding and bonds to the amount of \$1,550,000. The respondent did not offer any statement of original or historic cost, but submitted a summary which contained data as to the purchase of the stocks and bonds of the underlying companies now merged or consolidated in the Schuylkill Railway Company. We cannot from it, however, determine original cost. The company submitted an estimate of reproduction cost new less depreciation. This is figured as \$2,292,381. It represents a value of \$64,000 per mile of track. This estimate is based on prices of December 1, 1918. The Bureau of Engineering of the Commission gives a reproduction value new less depreciation, taking the same items of the respondent's estimate, as \$1,445,695. This would be \$40,500 per mile. The Bureau of Engineering of the Commission in arriving at this reproduction value considered the average prices for five years preceding December 31, 1917. There is no evidence of the market value of the bonds or stock. The estimate of reproduction new made by respondent's and the Commission's engineers does not contain any item for developmental or going cost. The railway is constructed through a mountainous country with very few level portions, and is built over unstable and insecure right of way. The road traverses Schuylkill County, a locality devoted largely to the mining of coal, and there is considerable subsidence in the surface of the land. The conditions existing as to the character of the country and the surface of the land entail considerably more expense in the construction and in the maintenance of the right of way and rolling stock and in operating expenses generally than is ordinarily encountered. As the determination of the Commission will be based on increased expense of operation and the rate which the company will be permitted to put into effect will be experimental and for a brief period of time, we do not consider it necessary at present to determine the fair value of the respondent's property.

The respondent presented statements showing its operating income and net earnings from 1914 to 1918, inclusive. They showed gross revenue in 1914, \$225,178.63; 1915, \$246,343.49; 1916, \$309,103.07; 1917, \$340,701.09; 1918, \$335,569.64. The operating expenses include the rentals of leased lines. These rentals will be deducted in order to determine the net revenue applicable to

the investment. The expenses for the years mentioned, including the rentals, are as follows:

1914	\$139,122 57
1915	161,152 58
1916	237,787 78
1917	311,438 84

For 1918 the operating expenses, excluding the rental of leased lines, was \$247,879.07. The net revenue for each of the years mentioned is as follows:

1914	\$86,056 98
1915	85,192 01
1916	71,316 17
1917	29,262 15
1918	24,046 38

It will be noticed that this net revenue is arrived at as stated after deducting the rentals for leased lines. To arrive at the proper net revenue these items of rental charged as expenses should be added to the above. The rentals form a very considerable item of charge since 1916, in which year they amounted to \$38,638.33; in 1917, \$57,176.73, and in 1918, \$63,644.19. We will consider the years 1916, 1917, and 1918. In 1916 the net revenue (the rentals of leased lines not being charged as operating expenses) was \$109,954.50; 1917, \$86,438.88; and 1918, \$87,690.57. Depreciation is not included in the operating expenses. For the year 1918 the company was operating under a 7-cent fare to July 12th, and from July 12th to October 15th, an 8-cent fare was charged, and from October 15th to December 31st, the fare was 6 cents.

During 1918 the average fare was about 7 cents per zone. The Commission is of opinion that the net revenue produced in 1918, namely, \$87,690.57, is not sufficient to provide for taxes, depreciation, and a fair return. It is a very troublesome question to determine what is a just and reasonable fare to which the respondent is entitled under the evidence submitted. The result of operation under a 6, 7, and 8-cent rate shows that the revenue does not increase in proportion to the increase in the rate of fare. The figures submitted by the respondent indicate that where the fare is

increased from 6 to 7 cents, being an increase of $16 \frac{2}{3}\%$, the revenue increases less than five per cent., and on an increase to 8 cents, being $33 \frac{1}{3}\%$ above the 6-cent rate, the revenue increases but 13%. The estimate of the engineers confirms these percentages. It is thus apparent that as the fare is increased the traffic falls off. Some other method than merely increasing the fare is required in order to return the proper revenue. The railway company should endeavor to encourage travel and do whatever is necessary to increase the number of passengers carried. The evidence appears to show that the revenue received from a fare of 8 cents would not be more than is necessary for depreciation, taxes and to keep the property of the company in good condition, and provide a fair return. We are loath to permit the company to institute an 8-cent rate of fare. We are fearful that it will not inure to the benefit of the company and that the reduction in the number of passengers carried under such a rate will, in all probability, prevent a commensurate increase in the revenue.

There are peculiar conditions surrounding the operation of the respondent's railway, which places it in a class by itself. It is, as we have stated, constructed in a mountainous country, in some places over mines, and the wear and tear on the cars and the condition of the surface of the land over which the right of way runs entails more expense in keeping the cars in order and maintaining the roadbed than is usual. It has no large cities from which to draw its patrons, and while it connects comparatively populous communities, some of its divisions traverse through regions sparsely settled. It has very few short riders to depend upon. For these reasons we distinguish this company from most of the companies operating in this State.

As an emergency measure and for the purpose of giving the company what appears to be the necessary relief, we will grant the application for an 8-cent fare but will refuse that part of the application which provides for 13 tickets for \$1.00, and will order the company to sell 7 tickets for 50 cents. The Commission will permit this to be put into effect on one day's notice until June 1, 1920, the company before that time reporting to the Commission the result of this experiment.

The complaint of the Borough of Mahanoy City as to the service will be disposed of at some future time in another report. The Borough of Mahanoy City requested the Commission to order a transfer from the Mahanoy division to the Lakeside division. It appears that the Mahanoy City, Girardville & Ashland Street Railway tracks run through Centre street in the Borough of Mahanoy City, the entire length of the borough. The Lakeside division terminates in Mahanoy City, about 225 yards from the tracks of the Mahanoy division, at the corner of Main and Centre streets. The company has requested permission from the borough authorities to join these two divisions at Main and Centre streets. This the borough has refused. The Commission will not order a transfer between these divisions until they are connected. If the Borough of Mahanoy City desires transfers between these two divisions the borough authorities should give permission to the respondent to lay the necessary tracks to make the connection. When this is done, if the respondent refuses to give transfers from one division to the other, the Borough of Mahanoy City may then file its complaint. At the present time the complaint in this respondent will be dismissed. We will not, as requested by the respondent, authorize the construction of the track necessary to make connection between these divisions. This is a matter for the borough authorities. We cannot compel the local authorities to give their consent to the construction of this connection.

An order will, therefore, be made dismissing the complaints, except as to the service, and the company will be permitted, upon one day's notice, to file a tariff or schedule of rates providing for an 8-cent fare and 7 tickets for 50 cents, to continue in effect until June 1, 1920. An order will be entered in accordance herewith.

ORDER.

These matters being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answers on and application on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, April 22, 1919, It is ordered: That the complaints be and the same are hereby dismissed, except that portion of the complaint of the Borough of Mahanoy City (C. 2133) with respect to service, the same to be disposed of at some future time.

It is further ordered: That the application of the Schuylkill Railway Company, respondent, be approved to the extent that said company is hereby permitted to file, upon one day's notice, a tariff or schedule of rates providing for an eight-cent fare per zone, on each division of its system (except from St. Clair to Pottsville, where the fare is to remain at five cents), and to sell a book of seven (7) tickets for fifty cents.

It is further ordered: That these rates are to remain in effect until June 1, 1920, the company to report to the Commission prior to that date the results of its operations under said tariff schedule.

By the Commission,

WM. D. B. AINEY, *Chairman.*

HENRY C. DYER *v.* PHILADELPHIA RAPID TRANSIT CO.

Tracks—Alleged to have been unlawfully located in a certain locality—Jurisdiction of Commission to grant relief.

The Public Service Commission has no authority to determine whether the tracks of a public utility have been placed in a public square of the City of Philadelphia contrary to law or not, when it appears that said tracks were laid by permission of local authorities.

COMPLAINT DOCKET NO. 2663.

Report and Order of the Commission.

Edwin Booth, for complainant.

Boyd Lee Spahr and *Ellis Ames Ballard*, for respondent.

BY THE COMMISSION:

The complaint filed in this case raises no question which is within the jurisdiction of this Commission. If the complainant is

injured, or if any relief from the actions complained of is to be granted it must be by some body other than this Commission since we have not been able to find in the Public Service Company Law any provision authorizing us to act in a matter of this kind, nor has the complainant directed our attention to anything in that act which would authorize an order such as he desires to have made.

The complainant alleges that the respondent company has unlawfully laid its tracks within the original boundaries of Logan Square in the City of Philadelphia, and, to this, the company has filed a demurrer admitting that the track has been laid "within the bed of Logan Square as it formerly existed," but denying that such relocation is unlawful. It appears that the construction of the track complained of has been made at the direction of the Commissioners of Fairmount Park, whose authority in the premises is said to be based upon an ordinance of the city councils of Philadelphia enacted May 20, 1915, under the provisions of the Acts of April 17, 1913, and April 14, 1868. We are unable to see that it is the duty of this Commission to pass upon the legality of either the powers claimed by the Park Commissioners or the action of the respondent in this matter.

An order will therefore be issued sustaining the demurrer in this proceeding and dismissing the complaint for the reason that the matters complained of are not within the jurisdiction of this Commission.

ORDER.

This matter being before the Commission upon complaint and demurrer on file and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its finding of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, April 14, 1919, It is ordered: That the demurrer filed in this case be, and the same is hereby, sustained, and the complaint dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

WAYNE TITLE & TRUST CO., JOSEPH A. BALL, ET AL., v. WAYNE
SEWERAGE COMPANY.

Rates—Sewerage plants—Increase of—Contrary to agreement between company and its patrons—Covenants in certain deeds providing for free use of sewerage system—Court decision upholding covenants—Jurisdiction of Commission—Police power of State.

The respondent filed a new tariff changing its system of charges from a room basis to a fixture basis and at the same time increasing materially the rates for service.

The complaints alleged that the fixture basis of assessing charges was unjust and unreasonable, that the increased rates were excessive and unwarranted and that the increase was in direct violation of an agreement between the respondent and its patrons.

In the course of the hearing it developed that some patrons of the respondent paid nothing for the service rendered, their exemption arising from the fact that certain deeds contained a covenant entitling them to the "free use of the drainage system." The Court of Delaware County had entered a decree upholding the rights of these patrons to the free use of the system.

The Commission, predicated its decision on the basis that all patrons should pay for the service rendered, held that the agreement fixing rates must give way to the policy of law established by the Public Service Company Act, which gives the Commission power to determine the reasonableness of rates. The agreement was held, therefore, to be void.

It also held that the perpetual exemption of the complainants' properties from the payment of sewerage rates would be contrary to the purposes of the Public Service Company Law and would constitute discrimination in their favor.

The fixture basis of rates was held not unreasonable.

The parties to the proceeding having agreed upon \$177,913.81 as the rate base for the purpose of determining the reasonableness of the rates in this case, the Commission allowed practically a seven per cent. return upon this amount after the payment of operating expenses and providing for depreciation. The respondent was directed to file a schedule of rates that would return the required amount and the complaints were otherwise dismissed.

COMPLAINT DOCKET NOS. 2170, 2171, 2172, 2173, 2178, 2207, AND
2293.

Report and Order of the Commission.

Louis Jaquette Palmer, for complainants.

William I. Schaffer, for respondents.

AINEY, Chairman :

The Wayne Sewerage Company serves approximately 725 patrons in Wayne and St. Davids, suburbs of Philadelphia, located in Delaware County, along the main line of the Pennsylvania Railroad. Effective July 15, 1918, the respondent filed a tariff changing its system of charges from a room basis to a fixture basis and at the same time increasing materially the resulting charges to its patrons.

Prior to the effective date of the tariff (with the exception of Complaint No. 2293) complaints were filed with the Commission alleging that the fixture basis of assessing the charges is unjust and inequitable, that the resulting increase in charges is unwarranted and unreasonable, and that the rates complained of are in direct violation of an agreement made in the year 1905 between the respondent and one Joseph A. Ball, acting for himself and other patrons, wherein certain rates for service are specified and provision is made for their continuance for specified periods subject to change only after notice and arbitration.

The respondent in its answers contends that the fixture basis of assessing charges is a reasonable one frequently employed by sewerage companies and that the rates in question will not return an excessive revenue. With respect to the Ball agreement, respondent contends that since the Public Service Company Law has been in force the said agreement is no longer binding upon the respondent and that regardless of the conditions in the said agreement the Public Service Commission has jurisdiction to determine the reasonableness of respondent's rates for service. The several complaints were heard together and will be disposed of as one.

About 1883 the owners of a large tract of land in Radnor Township, Delaware County, began the development of what is to-day the suburban residential section known as Wayne and St. Davids. Streets were laid out and the community given the ad-

vantages of central steam heating, electricity, gas and water and a complete system of sewerage was installed.

The deeds from the tract owners conveying portions of the tract as developed contained, *inter alia*, the following clause: "Together with the free use of the drainage system of Wayne, with the right to connect with the same." Later deeds covering other parcels contained the same clause with the exception of the word "free." Other parcels under deeds making no mention of the drainage system were conveyed, and shortly thereafter were connected with the sewerage system without specific agreements or without references being made to the use of the sewers.

The sewage from all of the properties was disposed of free of charge by the grantees who were developing the property and who are hereinafter referred to as the Wayne Estate.

Prior to 1892 the sewage was allowed to flow by gravity into graded surface ditches discharging into some woodland. As the population increased, this method of disposal became inadequate, and about the year 1892 there was constructed by the Wayne Estate a system of disposal called the "Waring" system, by which the sewage was collected in a receiving reservoir and then pumped into another reservoir on top of a hill, from which it was allowed to flow down the hill through ditches filled with cinders, etc., for the purpose of purifying and clarifying it, and the effluent was finally discharged into Ithan creek.

Some time prior to 1903 the American Pipe Company, of which the respondent is a subsidiary company, desired to acquire title to the water plant of the Wayne Estate, now known as the Springfield Consolidated Water Company. In order to secure the Wayne Water Works, the American Pipe Company had to purchase with it the sewerage system belonging to the Wayne Estate. The water plant was turned over to the Springfield Consolidated Water Company, and the Wayne Sewerage Company was incorporated December 1, 1902, to take over and operate the sewerage plant. The transfer of title of both services from Drexel and Childs (the Wayne Estate) was made to George N. Bunting, on October 22, 1902. Mr. Bunting became treasurer of the respondent company upon its incorporation and he conveyed the title of the sew-

erage system to the Wayne Sewerage Company on February 20, 1903.

No charges were made for sewerage service to any of the property owners until January 1, 1904, when the respondent rendered bills, some of which were paid and others not. A controversy thus arose between the respondent and its patrons, culminating about July, 1905, and was adjusted, at least so far as a large majority of the patrons were concerned, by what is known as the "Ball Agreement," which was entered into on November 29, 1905, "without prejudice" and under which then, or subsequently, nearly all the patrons agreed to pay certain rates for sewerage service. The rates were to remain in effect until July 1, 1910, and provision was made for changes after notice and arbitration at that time and also at the end of each subsequent five-year period. In 1903 there were 411 patrons on the system, and in 1905, 445, most of whom had accepted the provisions of the "Ball Agreement."

Under date of December 4, 1905, the State Commissioner of Health notified the respondent that sewage was being illegally discharged into Ithan creek and practically directed the company to install an improved sewage disposal works. Plans were prepared, approved by the State Department of Health, and a new disposal plant costing approximately \$95,000 was installed during 1906 and 1907, which with the addition of certain improvements and extensions of mains forms the system now in operation.

A number of the property owners having deeds containing the clause entitling them to the free use of the sewer system refused to pay the rates provided in the Ball Agreement. In 1911 the respondent instituted equity proceedings in the Courts of Delaware County for the purpose of collecting these sewer rentals. This suit was not terminated until 1916, when a decree was entered dismissing the said action as to some forty-nine property owners who were held to have express grants of the use of said drainage pipes. The court held that the respondent by its purchase from the Wayne Estate was not an innocent purchaser without notice and therefore assumed the relation which the Wayne Estate theretofore bore with regard to the rights of the said property owners, both as to the disposal of sewage under the old War-

ing system and under the method substituted as a result of the permit and direction of the State Department of Health. It therefore appears that certain property owners have never paid any sewerage rentals up to the present time, and that others claiming similar rights have been paying rentals under the Ball Agreement and claim they will not be liable for any rentals in case that agreement is annulled.

The rates for service fixed in the Ball Agreement have been in effect since 1905 and are set forth in respondent's tariff P. S. C. Pa. No. 1. The rates against which complainant is directed are contained in respondent's tariff P. S. C. Pa. No. 2, effective July 15, 1918, and are on a fixture basis whereas the old rates were on a room basis. The following table presents a comparison of the old and new rates: (See p. 393.)

The respondent submitted a detailed comparison of the revenues resulting from the application of the old and the new rates to the 1917 conditions. The computations are based upon the results of a complete survey of the 725 properties connected to the system and for the new rates assume that every water fixture now in service will remain in service and that every property on the system regardless of covenants in deeds or terms of earlier agreements will pay the prescribed rates.

The estimate is as follows:

Application of new rates to 1917 business	\$20,185 75
Application of old rates to 1917 business	8,853 09
Increase	<u>\$11,332 66</u>

It is to be noted that the above statements of rentals under the old rates does not include the rentals that ordinarily would accrue against the properties exempt from payment, the exact amount of which is not set forth in the record. Assuming that these are average, the resulting revenue under the old rate would be approximately \$9,600, making the increase in rentals \$10,586, or an average increase of 110%.

Schedule of Rates under Ball Agreement of November 29, 1905, as contained in P. S. C. Pa. No. 1.

	<i>Annual Rate</i>
Dwelling houses of twelve rooms or less	\$10 00
For each additional room .	1 00
For stable—one to three stalls	5 00
For stable—four to five stalls	7 50
For stables used for house-keeping purposes in addition to ordinary use ..	10 00
For each church building .	15 00
For all buildings not enumerated in schedule, rates are to be agreed upon.	

No building, other than a stable shall be allowed to connect with the sewer for a less rate than \$10.00 per annum.

A room is hereby defined to be any subdivision of a house containing not less than 180 cubic feet, in which subdivision there is at least a window and a door.

Schedule of Rates Effective July 15, 1918, as set forth in P. S. C. Pa. No. 2.

FIXTURES.	
<i>For Dwelling Houses.</i>	<i>Annual Rate</i>
Kitchen sink	\$7 00
Each additional sink	1 25
Water-closets—each	4 00
Urinals—each	4 00
Bath tubs—each	4 00
Shower baths—each	4 00
Washstands—each	1 25
Laundry tubs—each	1 25

<i>For Stores and Offices.</i>	
Sinks or washstands—each	6 00
Water-closets—each	6 00
Urinals—each	6 00

<i>For Halls, Public Buildings and Moving Picture Halls.</i>	
First sink or washstand ...	12 00
Each additional sink or washstand	6 00

	<i>Per Annum</i>
First water-closet	\$15 00
Each additional water-closet	7 50
First urinal	15 00
Each additional urinal	7 50

For all fixtures not enumerated in schedule, rates are to be agreed upon.	
For each school room	10 00

An annual minimum charge of \$12.00 will be made for each sewer connection in event the annual rate for the fixtures in use do not amount to that sum.

With respect to the form of the rate schedule, the respondent contends that the fixture basis is the more modern one and submitted evidence showing its use in several New Jersey communities and approval of the form by the Public Service Commission of that state. The testimony was not contradicted and complainants' strongest contention is that the long period of use without any attempt at a change in method is evidence that it was satisfactory to the company and its patrons. Both methods are flat rate in form and both are naturally open to some criticism. The fixture basis imposes upon the utility a larger burden of inspection

and on the other hand affords an opportunity to the patron to reduce the amount of the bill by eliminating fixtures. The criticism that the number of fixtures is not necessarily a true measure of the demand for service or of the amount of service rendered can be made with equal force against the room basis. Practical reasons prevent a determination of the amount of service by meter measurement of the sewage, and even if it were possible for the respondent to secure the necessary data, the amount of water used in the respective properties would not necessarily be a better measure of the amount of service rendered than either the fixture or the room basis. The Commission is of the opinion that the evidence does not warrant an order requiring the respondent to revert to the room basis.

During the year 1903 to 1906, inclusive, there was a deficit from operation of approximately \$14,000. In 1907 the gross revenues exceeded the operating expenses by \$481; in 1908, by \$1,692, and by gradually increasing amounts until in 1917 the margin was \$5,158. The total amount available for depreciation \$21,000, or an average of \$1,400 per annum. During this period the cost of the plant, as carried on the books of the company, increased from \$50,160 in 1903, to \$177,914 in 1917, and the bonds outstanding increased from \$50,000 to \$243,000 in the same period. The first charge for depreciation, \$2,486.09, was set up in 1917. The operating expenses and revenues reported by the respondent for the past five years are as follows:

<i>Year</i>	<i>No. of Patrons</i>	<i>Gross Revenue</i>	<i>Operating Expenses and Taxes</i>	<i>Available Depreciation and Return</i>
1913	670	\$7,317 90	\$2,985 98	\$4,331 92
1914	693	7,868 26	2,993 67	4,874 59
1915	707	9,096 39	4,920 76	4,176 63
1916	713	8,513 67	3,949 97	4,563 70
1917	725	9,169 01	4,011 10	5,157 91

The evidence indicates that there has not been any abnormal increase in the operating expenses in recent years and that for the purpose of testing the reasonableness of the rates a fair allowance for operating expenses is \$4,200 per annum.

The allowance claimed by the respondent for depreciation was determined by applying a factor of $1\frac{1}{2}\%$ to \$165,783, the book

cost of the property less the discount on bonds. The property is made up largely of long lived items and a study of the depreciation table submitted by respondent's engineer leads to the conclusion that the factor proposed is too large and that for the present purposes a fair allowance for depreciation is \$1,600 per annum.

The number of patrons has increased from 411 in 1903, to 725 in 1917, the growth in recent years being relatively slow, as shown in the above table. The increased demands for service have been met by extensions to the collecting system, the total length of which was 9.8 miles in 1903, and 13.1 miles in 1917.

The statement of assets and liabilities as of December 31, 1917, shows liabilities set up for \$50,000 of capital stock and \$243,000 of first mortgage 5% bonds, dated November 1, 1909, and due November 1, 1959. No evidence was offered as to the market value of these securities. The bond account shows that beginning with the payment of \$50,000 in bonds for the property purchased in 1903, bonds have been issued from time to time to pay for improvements and additions to the property and also to pay operating and interest charges, the latest issue being in the year 1912. The statement shows that these bonds, with the exception of the first \$50,000 were issued at practically 90. The division of the amounts issued and the discounts between capital purposes and operation is set forth in the following table:

	<i>Total</i>	<i>Discount</i>	<i>Net Proceeds</i>
Bonds issued for plant .	\$171,518 50	\$12,130 40	\$159,388 10
Bonds issued for operation	71,481 50	7,125 58	64,355 92
Total bonds issued .	\$243,000 00	\$19,255 98	\$223,744 02

The respondent carries its plant and equipment at \$227,913.81 in its statement of assets and liabilities as of December 31, 1917. Respondent's Exhibit No. 7 shows the cost of the plant by years, beginning with \$50,160.01 in 1903, and ending with \$177,913.81.

Approximately \$100,000 of the difference is accounted for by the improved disposal plant installed in 1906 and 1907, the balance of the difference was explained as having been spent for ad-

ditions and extensions. The statement does not show for what items of plant the expenditures in the respective years were made.

The respondent's engineer testified that the cost of reproduction new of the property is \$235,934; that the accrued depreciation is \$22,550, leaving a net present value of \$213,384, to which the witness adds for going cost \$5,430, making a total of \$218,814.

Respondent's engineer stated that in his judgment the fair value of respondent's property for rate making purposes is \$250,000. After the hearings had progressed for some time, an agreement was reached that the respondent would not ask for a determination of the fair value of the property, nor seek a fair return upon a greater amount than \$177,913, and that the complainants would not controvert the fact that said amount was the value of the physical property of respondent, including both used and useful property and property that complainants contend is not used or useful. The issues were thus greatly narrowed, and the cross-examination of the respondent's engineer with respect to reproduction new was waived. As was stated by counsel for complainants at final hearing (p. 94), "So far as the owners of property in Wayne are concerned, I do not think they would question the rate base upon which the rate structure was put that was filed with the Commission. That is, they took their cost as the basis of their rate structure, \$170,000 (approximately). It is the rate of return that is the question in this case."

It further appeared from statement of counsel for complainants that had it not been for the introduction of the engineer's testimony with respect to the cost of reproduction new (\$218,814), and estimate of fair value (\$250,000) he doubted "whether the rate base of the original cost" (\$177,913.81) "would have been questioned, and the argument would have come solely then on the question, is a public service company entitled to a seven per cent. or a six per cent. return, if the rate itself is not reasonable." * * * "We are not disposed to object to the \$177,000 as a rate base."

The agreement of counsel was arrived at colloquially and may be summarized as follows:

On the part of the complainants they do not object to \$177,913.81 as a rate base for the purpose of this case, but they do object to that amount being fixed as the fair value of the physical

property, used and useful, devoted to public service. While not controverting that that represents the cost, they maintain that some \$30,000 of it is not now used in performing the service rendered the public. On the part of the respondent they would not seek a determination in this proceeding of the fair value of respondent's property for rate making purposes, nor would they ask for a fair return on any greater sum than \$177,913.81.

Cross-examination of respondent's engineer who had testified to the cost of reproduction new and who was present and was called to the stand, was then waived by complainants. No testimony was offered on the part of the complainants as to any branch of the case except with respect to the court proceedings in Delaware County which have been adverted to, and several deeds from the Wayne Estate to some of the complainants containing the clauses with respect to drainage heretofore mentioned.

While it is true that the amount suggested, \$177,913.81, is equivalent to the amount presented by respondent as original cost, it is impossible under the agreement which was reached and the testimony which was offered, both with respect to original cost and cost of reproduction new, to treat it as the original cost of respondent's plant.

This amount is under the agreement a limitation upon the amount of return which the respondent would ask and the complainants would accept. Unless the Commission undertook to determine a fair value for rate making purposes, and to ascertain the original cost and the cost of reproduction new as factors in that determination, it would be futile for the Commission to seek to place a monetary value or cost figure upon items which the complainants maintain should be deducted. An attempt to do so on our part would defeat the purposes of the agreement by compelling us to determine the original cost and the cost of reproduction new as base figures from which deductions could be made. Inasmuch as the parties have agreed that the value of respondent's physical property for the purpose of this hearing is not claimed to be more nor less than the amount stated (\$177,913.81), without adopting that amount as the fair value of respondent's property devoted to public service, binding upon the Commission, the complainants or respondent in any future proceeding, we can and under the circumstances we think we ought to adopt it as a

measure by which to determine the reasonableness of the rates which respondent has imposed, and it would appear to be a proper base upon which, to that end, we might apply a rate of return of seven per cent., being the rate asked for by respondent in the present proceedings (p. 91).

The grounds upon which the complainants placed especial emphasis in attacking respondent's rates were that they were in excess of the value of the service and that they were in violation of the terms of the deeds and of the later Ball agreement.

With respect to the value of the service it was alleged that it would be cheaper for property owners to dig cesspools which would produce a condition which complainants characterized as deplorable, and it was further suggested that the respondent's having in 1905 agreed to certain rates which were continued until 1918, without attempting to change them at the end of five-year periods which it might have done under the Ball agreement, even though the operation during these periods produced revenues that fell short of returning a legal rate of interest on the money actually invested without any allowance being made for depreciation, was some evidence of the value of the service in the mind of the company and of its patrons.

As we understand the contention of the complainants with respect to this feature of the case, it is that the value of the service must determine the rates even if such rates would produce a return less in amount than that which the legal rate of interest would provide. In *Brymer v. Butler Water Company*, 179 Pa. 231 (250), it was said: "Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plan, pay fixed charges and operating expenses * * * and pay a fair profit to the owners of the property, cannot be said to be unreasonable."

In *Pennsylvania Railroad Company v. Philadelphia County*, 220 Pa. 100 (115), the court said: "What was said in *Brymer v. Water Company*, 179 Pa. 231, was, that the company was entitled to a fair return, not less than the legal rate of interest. In naming the legal rate the court was naming a minimum and not

maximum rate." The court continuing, states that these elements, such as original investments, the risks assumed at that time, the returns as compared with other enterprises, the cost of maintenance and improvements, the prospects of increase and the present value in view of the preceding elements, are to be regarded in order to avoid injustice, and concludes: "Injustice is done by anything that fails to consider these, and to deal equitably with the private as well as the public interests involved."

The actual sewerage rentals in 1917 were \$8,853. Assuming that all of the 725 patrons had paid, the rentals under the old rates would have been approximately \$9,600, deducting for operating expenses \$4,200, and for depreciation \$1,600, total \$5,800, there would have been left available for return \$3,800. This amount would yield two per cent. on \$177,913.81.

Assuming that all of the 725 properties remain on the system without reduction in the number of fixtures, and that all continued to pay regardless of agreements or covenants, the new rates would return rentals approximating \$20,200, which would leave available for fair return \$14,400, or eight per cent. on \$177,913.81. But this may not be the actual experience of the respondent, as patrons may not all be retained and those who do may readjust their fixture requirements.

With respect to the violation of the Ball agreement by the establishment of the increased rates, effective July 15, 1918, there appears to be little room for discussion. Rates fixed by contract or agreement must give way to the policy of law established by the Public Service Company Act, and all rates when attacked must stand or fall as they are determined to be just or unjust, reasonable or unreasonable. It may, however, with propriety be here stated that rates upon which the minds of parties have been in accord furnish some evidence of their reasonableness and we have given them for that reason due consideration.

It is obvious that if the Ball agreement stands, or if the decree of the court upon a state of facts existing prior to the passage of the Public Service Company Law are binding upon the respondent and those of its patrons therein favored, then it would be useless for this Commission to attempt to regulate the rates of this company or to establish as between its patrons any fair apportionment of the cost to them of the service which they are re-

ceiving at the respondent's hands. If some pay nothing and others too little, the respondent would be compelled to accept the alternative of raising the rates upon those not within the favorable terms provided in the deeds or the Ball agreement, or operating on a confiscatory basis. Neither of these alternatives are tenable from the standpoint of public service.

For the same reason but with more impelling necessity, this Commission as an administrative body cannot sustain covenants contained in deeds assuring to the grantees free service. Whatever validity such agreements might have as between private interests, their enforcement as between patrons and public service companies would lead to difficulties so great as to prevent the functioning of the latter in the public interest.

The action brought by respondent in the Delaware County Courts in 1911, to compel payments of rentals was disposed of upon issues of fact and law not involving the later exercise of the police power of the State by the legislature in passing the Public Service Company Law.

The perpetual exemption of complainants' properties from the payment of sewerage rates would be contrary to the purposes of the Public Service Company Law which requires that public service companies shall not "change, demand, etc., for any service rendered, a greater or less compensation or sum than it shall demand, charge, etc., for a like and contemporaneous service under substantially similar circumstances and conditions."

Where "the rights of individuals under a contract which would otherwise be perfectly valid are in conflict with the 'general well-being of the State' the rights of the individuals must give way to the general welfare." *Lepier v. B. & O. R. R. Co.*, 7 P. C. R. 218; 262 Pa. 328.

Under all the circumstances, the Commission is of the opinion that the continued exemption of said properties from the payment of sewerage rentals would set up a discriminatory situation that is contrary to general welfare and therefore cannot be countenanced. There are unusual conditions presented to us in the instant case; the natural feeling of injustice which some of the complainants may have by reason of the provisions in their deeds af-

fording them free drainage, the fact that in most localities of Pennsylvania sewage disposal is municipally cared for, and that the expense thereof is visited on property owners indirectly out of tax levies are matters which under the Public Service Company Law we cannot change.

It may be that the acquisition of the respondent's plant by the municipalities in which complainants reside, at a fair value, would be the best solution of the difficulties and would thus relieve the ratepayers of the direct and unusual expense for sewage disposal.

The respondent should prepare and submit to the Commission for its approval, within thirty days of this order, a schedule of rates that will yield substantially \$18,500 when applied to 1917 data, the basis upon which this decision is predicated, and to that extent the complaint is sustained and it is otherwise dismissed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had, and the Commission on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made part hereof:

Now, to wit, April 15, 1919, the respondent, the Wayne Sewerage Company, is to prepare and submit to the Commission for its approval, within thirty days of the service of this order, a schedule of rates that will yield to it annually substantially \$18,500 when applied to the 1917 data, the basis upon which the foregoing report is predicated. To that extent the complainant is sustained, and in all other respects it is dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

IN THE MATTER OF THE INVESTIGATION OF THE INCREASED RATES
OF THE POSTAL TELEGRAPH CABLE COMPANY.

COMPLAINT DOCKET No. 2731.

Order of the Commission.

It appearing to the Public Service Commission of the Commonwealth of Pennsylvania, after investigation upon its own motion, that the Postal Telegraph Cable Company, its agents and employees, are charging and collecting for service rendered in this Commonwealth since April 1, 1919, rates which are not contained in the tariffs and schedules of said company filed, posted and published in accordance with the provisions of the Public Service Company Law, said rates being in excess of those contained in the tariffs of said company, and this Commission being of the opinion that the rates so being charged and collected are illegal and contrary to law:

Now, to wit, April 7, 1919, the *Postal Telegraph Cable Company*, its agents and employees, are hereby *ordered* to cease and desist from charging or collecting any rates for service rendered by said company, within this Commonwealth, in excess of or different from the rates and charges contained in the tariffs and schedules of said company on file with this Commission and in effect prior to April 1, 1919.

By the Commission,

WM. D. B. AINEY, *Chairman*.

NOTE.—A similar order was directed to the Western Union Telegraph Company.

BEAVER VALLEY WATER COMPANY, APPELLANT, v. THE PUBLIC SERVICE COMMISSION, APPELLEE, AND SOLON C. THAYER ET AL., INTERVENING APPELLEE.

Rates—Water companies—Valuation for rate making purposes—Going concern value—Discrimination of the Commission—Jurisdiction of court on appeal.

In fixing a valuation for rate making purposes, it is within the discretion of the Commission to allow or disallow for going concern value and other intangible elements. The exercise of this discretion is not subject to review by the courts.

Ben Avon Borough v. Ohio Valley Water Co., 260 Pa., 6. P. C. R. 60, 75, followed.

In the Superior Court of Pennsylvania. No. 88 April Term, 1917. Appeal from order of the Public Service Commission in re Solon C. Thayer et al. v. Beaver Valley Water Company, Complaint Docket Nos. 187, 188. (See 4 P. C. R. 1, 585.) Affirmed.

McKee, Mitchell & Alter, for appellant.

Berne H. Evans, for appellee.

J. Sharp Wilson and Lawrence H. Sebring, for intervening appellee.

KEPHART, J., January 3, 1919:

The Beaver Valley Water Company was incorporated in 1902 to supply water in a district between Freedom and Baden, on the northeasterly side of the Ohio river. Shortly after its organization it took over various water companies supplying seven municipalities, covering a stretch of territory approximately eleven miles in length. The company filed two schedules increasing the water rates through this territory, one in 1912 and the second in 1914. Complaints were filed to both of these schedules which were disposed of in this proceeding. The company at that hearing asked that a schedule be adopted which would yield a fair return on a valuation of \$2,540,000. This value was arrived at from an appraisalment by the company of its property for rate purposes. It had a bonded indebtedness which sold at par for \$1,038,000.00, an indebtedness of the underlying companies of

\$187,871.34, and a stock issue of approximately \$1,000,000.00. The Commission, after hearing the evidence, fixed a value of \$985,000.00. The value so found by the Commission represented the "bare bones" of the plant, stripped of all those items which are sometimes referred to as intangible property, which, with the physical property, make up present value. The Commission fixed this at what it would cost at this time to reproduce the physical property of this plant—pipe lines, right of way, reservoirs, real estate, etc.—less depreciation. It did not allow for going concern value, or the cost of developing the business of the plant; nor for unpaid or deferred dividends, as suggested in a Supreme Court opinion; nor the property that was not presently useful; nor, it is claimed, property that was in use but was acquired by the company in the nature of a gift; nor did it allow for duplicate lines where the company stated these duplicate lines were necessary to supply present demand. The Commission fixed the value as though the plant had been constructed at the present time, less depreciation, with a capacity of each part sufficient to take care of present-day demand without regard to whether the plant had one customer or ten thousand customers. The appellant complains that the Commission erred in not allowing nineteen separate items of value relating to either the physical or intangible property of the company. They are as follows:

A. Eight thousand four hundred and seventy feet of 12-inch pipe from Freedom to Conway, and rock excavation,	\$15,772 00
B. Duplicate pipe in Beaver Falls distributing system,	39,330 00
C. Valves, etc., in Beaver Falls distributing system used with said duplicate pipe,	1,006 40
D. The People's Warehouse,	5,000 00
E. The New Brighton reservoir,	3,000 00
F. The Upper Freedom reservoir,	4,000 00
G. The Freedom pumping station,	13,500 00
H. Paving where mains were laid before pavements,	34,157 45
I. Service lines installed by consumers, .	60,861 50
J. Lands excluded from valuation,	64,187 50
K. Water power value at Hartman dam,	84,800 00

L. Water power value at New Brighton dam,	88,200 00
M. Bed of Beaver river,	100,000 00
N. Proposed additions to plant,	72,607 00
O. Going concern value,	250,000 00
P. Cost preliminary to construction,	30,000 00
Q. Promotion service,	} 120,000 00
R. Franchise costs,	
S. Financing and brokers' fees,	

In *Ben Avon Boro. v. Ohio Valley Water Co.*, 68 Pa. Superior Ct. 561; 260 Pa. 292, we considered the legal propositions as they bore upon the several questions presented by this appeal. In that case the court, following the direction of the Public Service Act, considered Section 22 of Article VI of the Public Service Act that required this court upon the record to determine whether the order appealed from was reasonable and in conformity with law. By Section 23 of the same act, the notes of testimony were made part of the record of the case. If, from this record the order did not appeal to the court as being a reasonable order, either from failure to consider items of value properly proven, or from a manifest disregard of evidence, or from reliance upon incompetent evidence, we were required to proceed as the law directed. The act plainly directed the evidence be reviewed, although in no event were we required to act as a second administrative commission. In the *Ohio Valley* case we endeavored to point out where the Commission had failed to allow items of value clearly proven and where there was title, and in some instances no testimony, to sustain its action, and where it had erred in its legal conclusion. In so directing, this court refrained as far as it was able from discussing or passing on questions where the evidence was fairly in dispute and the facts were found. The Commission neglected to give the values claimed, not because they were not there, but because it, as a Commission, did not believe them proper items of rate making value and claimed that some were insufficiently proven. On review by the Supreme Court, the concluding paragraph of the opinion marks the line for this court's consideration. "Much must be left to the sound discretion of the appraising body, the tribunal appointed by law and informed by experience, for the discharge of these delicate and complex duties. Its report must, of course justify itself in reason, upon review in

the appellate courts." Our conclusions in that case were declared to be a substitution by this court of our judgment for that of the Commission's. In effect, matters as here considered by the Commission were directed by the Supreme Court to be treated as discretionary matters within the control of the Commission. This court was in error in holding that the legislature did not intend the Commission's authority to be wholly discretionary, but as it was dealing with substantial property rights, its duty was fixed and if the Commission failed in its duty, the way was open to the courts to enforce it.

We will not discuss at length the testimony taken in the present appeal. For the purpose, however, of illustrating the effect of the final judgment of the Supreme Court: When we made the order in the Ohio Valley case returning to the Commission the record with direction to consider items of value that had been omitted, among those items was one of going concern value, the largest item in dispute. This same value is presented in this appeal. We pointed out that while the Commission said it would consider going concern value, as a matter of fact it did not allow anything for that value. We pointed to the schedule of reproduction cost, new, less depreciation, made by the Commission, as printed on page 565, 68 Pa. Superior Ct. There are enumerated the several items of this cost, and these items amounted in round figures to \$995,000.00. The Commission did not contemplate, nor was it ever intended in that case, that the item of going concern value or cost was divisible, to be attached to each of the separate items of physical property enumerated in that schedule. These items represented what it would actually cost—material, ground, labor, etc.—to reproduce the "bare bones" of the plant. The original cost of the property, part of which it was admitted could not be ascertained, as found by the Commission, was, in round figures, \$841,000.00, not including sufficient amounts for interest during construction, engineering, general administration and other items; but as is shown, the normal increase in the value from the time of purchase to the present time of this physical property would make the difference between rate making value and the partial original cost as found by the Commission, the records as to part of which were lost. This rate value as fixed was \$924,000.00, in round figures. There was no place in the Commission's findings

for going concern value. It was not allowed. The record returned would have required a value for this item, determined by the testimony then before the Commission, or from such other testimony it desired to secure. It was stated no claim was made that the stockholders suffered by reason of dividends being unduly deferred while the business was being built up. We do not see how deferred dividends could form any basis to fix going concern cost. The earnings of the company may go towards improvements, such as extensions, in which case the stockholders benefit in increased plant account. Whether the stockholders put any or all the money into the concern from their own purses, or use borrowed money, is not the chief concern before the Commission, although it may aid on the question of good faith to the public. The Commission does not act on the theory that issues of stock are controlling or, are evidence to, establish value. In the Ohio Valley case, as the bonds and indebtedness was \$200,000.00 more than the value for rate making purposes, the stockholders, under the Commission's orders, were held to be entitled to nothing. The earnings were barely sufficient to pay the interest on outstanding obligations, without considering a sinking fund to retire bonds as they fell due. What we thought the Commission should strive to secure is the present value for rate purposes.

In the present case, any reason which we might give for sustaining the item of going value would not be any more convincing than was given in the Ohio Valley case, and the Supreme Court held our action in that case was a substitution of our judgment for that of the Commission's. It may be readily seen how that case controls the present one. There might be this possible difference in the present case. The Commission said: "Upon the basis of the reproduction cost new method of ascertaining value for rate making, the Commission finds that the respondent has failed to sustain its claim for going value." There was considerable evidence to establish this value, but the action of the Commission in the Ohio Valley case did not differ from its unequivocal action in the present case. It did not allow the value in either case.

Complaint is made that the Commission allowed the value of but one of the duplicating lines in Beaver Falls. Either system alone was sufficient to supply the present demand according to the appellant's testimony. The value of the distributing system not

allowed was \$39,300.00. The reason given was that "they clearly would not find any physical counterpart in the conception of this plant reproduced." The Commission's reason may be sound as an abstract question, but it must be remembered that these companies were built into boroughs that were at the time thinly settled. A three-inch line was possibly all that would be necessary to supply the inhabitants. As the borough grew the demand grew, but the introduction of a competing system took away the necessity for enlarging the lines of the first company to handle this increased demand. It is quite true that any company building a line through this borough to-day would put in a main large enough to supply all of the demand, but it is equally true that had a main large enough to supply present-day demand been installed when the plant was first constructed, with a Public Service Commission then acting, a physical value then placed upon this property for rate purposes, under the rulings of this Commission, would not allow value for a pipe of that size. It would have been over-development. Whether the lines were competing or not, they now are necessary to the company's use. The appellee says they are not.

We appreciate the difficulties under which the Commission labors, but we appreciate, too, the difficulties under which investors in public utility companies labor where confiscation of property is permitted by those who are charged with the duty of protecting the owners. Where there is a conflict of testimony and the Commission has found the facts, this court has always held that the action of the Commission was final unless it was plainly against the manifest weight of the evidence. But, there is a decided difference between weighing disputed evidence and ascertaining whether the Commission has refused to consider competent evidence properly before them. All the other items bear a close relation to the questions raised in the Ohio Valley case with the exception of items "A," the pipe line from Freedom to Conway. We think the Commission properly disposed of this question. The appellant had a main which ran to the borough and some railroad yards in the line of its activities. They disposed of their distribution system in the borough and they never owned the distribution system in the railroad company's yards. The only thing that was left of their entire plant as it referred to this section was this

main which was occasionally called into use by the borough and the railroad company. When the appellant sold its distribution system, it should have taken care of a portion of the price of this main as it was properly a value that attached to that distribution system. If they neglected this, it was error in business judgment for which the other customers should not suffer. The Commission properly allowed but a portion of the value which was all that the company could expect under the circumstances. The other item of value was "K," the water power dam, sometimes known as the Eastville dam. The west abutment was constructed by the Pittsburgh & Lake Erie Railroad Co. It was built of heavy masonry, constructed with openings for developing the water power available at the west end of the dam. Such was the testimony of the appellant, and without which it would require an extension of one hundred and twenty feet to reach the western bank of the river. There does not seem to be any question about the ownership of this part of the dam. The value was not allowed by the Commission for the reason it was stated that the company had paid nothing for this improvement and should, therefore, not be allowed its value. The record does not seem to be as clear on this proposition as appellant seems to contend for, but if it is as they have argued it, we do not understand why the Commission should refuse to give value to the company for the piece of property that they were presented with. Under the rule laid down by the Supreme Court in the Ohio Valley case, any opinion different from the Commission's would be a substitution of our judgment. It is a claim that arises no higher than brokerage, interest paid during construction, going concern value, real estate owned by the company, and other items that have heretofore been discussed. We can add nothing to what the Supreme Court has said and what this court has said in a similar case. As the decision of the Supreme Court is binding on this court, we must affirm the order of the Commission at the cost of the appellant.

Judge HENDERSON concurs in the order.

COUNTY COURT OPINIONS.

COMMONWEALTH OF PENNSYLVANIA *v.* ROXFORD KNITTING CO.*Tax on loans—Corporate indebtedness—Promissory notes.*

Promissory notes given by a corporation are not subject to the tax imposed for State purposes by Section 17 of the Act of June 17, 1913, P. L. 516, but are subject to the tax imposed for county purposes by Section 1 of said act. *Com. v. Public Ledger Co.*, 7 P. C. R. 176, distinguished.

In the Court of Common Pleas of Dauphin County. No. 74 Commonwealth Docket, 1918. Appeal by defendant from the settlement of an account for the loan tax for 1917.

Francis Shunk Brown, Attorney General, and *Wm. M. Hargest*, Deputy Attorney General, for plaintiff.

Dickson, Beitler & McCouch, for defendant.

KUNKEL, P. J., April 29, 1919:

This is an appeal from the settlement of an account against the defendant company for the loan tax for the year 1917. By agreement it has been submitted to the court for trial without a jury. The facts of the case are stated in a written stipulation filed by the parties.

FACTS.

The defendant company was incorporated under the laws of this Commonwealth, and has its principal office and place of business in the City of Philadelphia. On August 7, 1918, the present settlement was made against it by the accounting officers of the Commonwealth in which it was charged with a tax of \$337.78 on an indebtedness of \$200,000, represented by promissory notes, payable six months after date, and owed to Drexel & Company, a copartnership doing a banking business. The money thus borrowed was used by the company in the purchase of material and in the payment of employees. An appeal was taken by the defendant from the settlement on the objections, that the indebtedness, having been incurred for current expenses, was not subject to the loan tax, and that the officers of the Commonwealth erred in making the settlement for it against the defendant.

DISCUSSION.

The Commonwealth suggests that this case is ruled by *Commonwealth v. Public Ledger Company*, 20 Commonwealth Docket, 1916, lately decided by this court, in which it was held that indebtedness incurred to meet current expenses was subject to the loan tax. This would be so if the taxability of the indebtedness was, as it was in that case, the only question presented for decision, but here the objection to the settlement, although very indefinitely expressed, may be construed to dispute the liability of the defendant for the tax and to challenge the power of the Commonwealth's officers to settle the tax against it. This is an additional question to that raised in *Commonwealth v. Public Ledger Company*.

Section 17 of the Act of June 17, 1913, P. L. 516, imposes a tax for State purposes on corporate scrip, bonds and certificates of indebtedness. The tax is required to be deducted by the treasurer of the corporation from the interest on the indebtedness when paid to the holders thereof. Section 4, Act June 30, 1885, P. L. 193; Section 18, Act June 17, 1913, P. L. 517. On failure to collect the tax the corporation is liable therefor. *Com. v. Del. Div. Canal Co.*, 123 Pa. 594; *Com. v. Lehigh Valley R. R. Company*, 129 Pa. 429; and 186 Pa. 235.

Section 1 of the Act of 1913 makes taxable for county purposes all personal property therein enumerated in the hands of the holder thereof, that is to say: ". . . all moneys owing by solvent debtors whether by promissory notes or penal or single bill, bond or judgment . . . and all loans issued by any corporation, etc., . . . and all loans secured by bonds or any other form of certificate or evidence of indebtedness . . . except such loans as are made taxable for State purposes by Section 17 hereof." Thus Section 1 imposes the tax for county purposes, and Section 17 for State purposes.

Are promissory notes discounted or negotiated by a bank or banking institution taxed by the former or latter section, or in other words do they fall within the term "certificates of indebtedness" as used in Section 17, so as to be subject to taxation for State purposes? We are of the opinion that they do not. The term "certificates of indebtedness" evidently refers to instruments

of like kind with scrip and bonds in connection with which it is used—instruments representing indebtedness of a higher and more permanent character than that represented by notes discounted or negotiated by a bank or banking institution. Such notes do not fall within the class embraced by scrip and bonds. They are not ordinarily spoken of as being issued, as in the case of a permanent or time loan made by a corporation; nor does the tax on them readily admit of collection in the manner prescribed for collecting the tax on the corporate obligations enumerated in Section 17. In many instances the interest on bankable promissory notes is deducted when the loan is made or the note discounted, and never comes into the hands of the borrower or debtor. We think rather that they fall within the class designated by the general language found in Section 1, "loans secured by any other form of certificate or evidence of indebtedness," if they do not come under the express words moneys owing by "promissory note." It will be observed that both sections use the term certificate of indebtedness. If taken literally the language of both might cover bankable promissory notes, but we find no intention in the act to impose a tax for county and State purposes on the same indebtedness. We must therefore determine which one was intended to cover corporate indebtedness evidenced by promissory notes discounted or negotiated by a bank. For the considerations stated we are of the opinion that it was the legislative intention to tax such instruments or evidences of indebtedness not for State purposes but by the first section of the act, for county purposes, except, of course, notes discounted or negotiated by an incorporated bank. *Com. v. McKean County*, 200 Pa. 383, which are exempted from the tax by the proviso thereof. Moreover the implication from the proviso to Section 1, excepting bank notes from its provisions is that promissory notes were intended to be covered by that section.

CONCLUSION.

We conclude:

1. That the defendant's loans represented by its promissory notes, are not taxable for State purposes.
2. That the tax thereon is not required to be collected by the corporation, but is collectible through the local authorities.

3. That the settlement is without authority of law.
4. That the defendant is entitled to judgment.

Wherefore judgment is directed to be entered against the Commonwealth and in favor of the defendant unless exceptions be filed within the time limited by law.

COMMONWEALTH OF PENNSYLVANIA *v.* LEHIGH & NEW ENGLAND
R. R. Co.

*Tax on loans — Corporate indebtedness — Promissory notes —
Equipment trust certificates.*

Equipment trust certificates given to secure to subscribers the payment of principal and interest, being specifically mentioned in Section 1 of the Act of June 17, 1913, P. L. 507, as "car trust securities" subject to taxation for county purposes, are not subject to the tax imposed by Section 17 of said act for State purposes.

Promissory notes are not certificates of indebtedness within the meaning of Section 17 above mentioned, and are not taxable thereunder. *Com. v. Roxford Knitting Co.*, ante p. 410, followed.

In the Court of Common Pleas of Dauphin County. No. 18 Commonwealth Docket, 1916. Appeal by defendant from the settlement of an account for loan tax for the year 1914.

Francis Shunk Brown, for the Commonwealth.

Olmsted & Stamm, for defendant.

KUNKEL, P. J., April 29, 1919:

This is an appeal by the defendant company from the settlement of an account against it for the loan tax for the year 1914. It is submitted to the court for trial without a jury. No requests for findings of fact have been made by counsel for either party. However, the facts are not in dispute and we find them generally as follows:

FACTS.

On September 23, 1915, the present account was settled against the defendant company in which it was charged, among other

items, with the loans tax on \$1,950,000, car equipment trust certificates or securities, and on \$900,000 indebtedness represented by promissory notes discounted and negotiated by private bankers. The latter indebtedness was incurred to meet the company's current expenses. It paid the taxes settled against it, except that charged on the equipment trust certificates and on the promissory notes and took this appeal, specifying as its objections to the account, that it was not required by law to collect the tax on the equipment trust certificates and hence was not liable therefor; and that the indebtedness represented by the promissory notes was not taxable because it was incurred and used for current expenses; nor was it an indebtedness, the tax on which the defendant was required by law to assess and collect.

The equipment trust certificates arose out of a transaction which may be stated generally, as follows: The defendant company acquired by a lease in writing from the lessor, who was also called the trustee, certain railroad equipment and rolling stock for which it agreed to make certain yearly payments as rent and hire therefor, the aggregate of which was to be equivalent to the cost of the equipment so leased during the stipulated period. On the expiration of the lease if the rentals were paid and the terms of the lease were complied with, the title to the property was to be transferred to the defendant company. Pending the lease the company had no title to the equipment other than as the lessee thereof. About the same time and in connection with the lease an agreement was entered into between the lessor in the lease or the trustee, and the defendant company, in which it was stated that subscriptions having been made to a fund known as the "Lehigh & New England Equipment Trust," which fund was to be applied to the payment of the purchase price of the railroad equipment and rolling stock mentioned in the lease, the trustee proposed to secure to the subscribers to the fund the payment thereof and the interest thereon in manner therein set forth and to evidence the rights of the subscribers to the fund by the delivery of certificates called the Lehigh & New England Equipment Trust. The fund thus raised and the interest thereon was to be paid from the rentals received on the lease. Pursuant to the lease and agreement, the equipment trust certificates were issued in which it was certified that the bearer was entitled to a share in

the equipment fund, the principal to be paid at the time mentioned therein, and the interest as evidenced by so called dividend warrants attached thereto.

DISCUSSION.

The defendant company contends that the certificates were not subject to the tax on loans and claims that the question is ruled by *Commonwealth v. Traction Company*, 192 Pa. 507. We are not convinced of the correctness of this contention or claim. The present case differs from the one referred to in some essential particulars, to which it is not necessary now to refer. Without deciding that question, we think it is clear that the defendant company is not liable for the tax on the certificates for another reason. The duty of collecting the tax has not been imposed upon it. Section 18 of the Act of June 17, 1913, P. L. 516, provides that the tax on corporate "scrip, bonds or certificates of indebtedness" shall be collected as theretofore, that is, by the corporation as provided by Section 4 of the Act of June 30, 1885, P. L. 193. The liability of the corporation for the tax arises only out of its failure or neglect to collect it. *Com. v. Del. Div. Canal Co.*, 123 Pa. 594; *Com. v. Lehigh Valley R. R. Co.*, 186 Pa. 235. Whether the duty of collecting the tax on the equipment trust certificates rested upon the defendant company depends upon the question whether they fall within the term "certificates of indebtedness" made taxable for State purposes by Section 17 of the Act of 1913. The term may be broad enough to cover them and might well be held to do so were it not for Section 1 of the same act, which imposes a tax for county purposes on "car trust securities." Thus such securities or certificates are made taxable not for State purposes but for county purposes by express mention. The well recognized rule of construction applies here: "That where there are in an act specific provisions relating to a particular subject they must govern in respect to that subject, as against general provisions in other parts of the statute; although the latter standing alone would be broad enough to include the subject to which the more particular provisions relate. Hence, if there are two provisions in the same act of which one is special and particular and clearly includes the matter in controversy, whilst the other is

general and would, if standing alone, include it also, and if, reading the general provisions side by side with the particular one the inclusion of that matter in the former would produce a conflict between it and the special provision, it must be taken that the latter was designed as an exception to the general provision." Endlich on Interpretation of Statutes, Section 216. As it appears that car trust securities are specifically mentioned among the taxable subjects of Section 1, and made thereby taxable for county purposes, they cannot be construed to fall within the provisions of Section 17, which imposes a tax for State purposes. The presumption is that there was no intention to place a double tax on obligations representing the same indebtedness. Not being taxable under Section 17, there was no duty resting upon the defendant company to assess and collect the tax on them. Hence it is not liable for the tax.

As to the liability of the defendant for the tax on the \$900,000 represented by promissory notes negotiated and discounted by private bankers, it is sufficient to say that this question was ruled in *Commonwealth v. Roxford Knitting Company* in an opinion lately filed in this court, where it was held that such obligations are not taxable, under Section 17, for State purposes but under Section 1, for county purposes, and that the tax thereon is not collectible by the corporation but by the local authorities.

Wherefore we conclude:

1. That the equipment trust certificates are not subject to the loan tax for State purposes.
2. The defendant company was not bound to collect the tax thereon but the same was collectible by the local authorities.
3. The indebtedness represented by the promissory notes was not subject to the tax on loans under Section 17 of the Act of 1913, but was taxable for county purposes under Section 1 of that act.
4. That the defendant company was not bound under the law to collect the tax thereon.
5. That the settlement made against it for the loan tax on its equipment trust certificates and its promissory notes negotiated and discounted by private bankers was without authority of law.
6. That the defendant company having paid the tax on the account settled against it, except that on the equipment trust certificates and promissory notes, is entitled to judgment.

Whereupon judgment is directed to be entered in its favor and against the Commonwealth, unless exceptions be filed within the time required by law.

COMMONWEALTH OF PENNSYLVANIA *v.* LANCASTER ELECTRIC
LIGHT, HEAT & POWER COMPANY.

Tax on loans—Corporate indebtedness—Not evidenced by obligation of defendant company.

The indebtedness of a corporation appearing only in a statement contained in its books as cash advances and not represented by any obligation given by it, is not taxable for State purposes under the Act of June 17, 1913, P. L. 507. Such indebtedness does not fall within the description contained in Section 17 of said act which imposes a State tax upon corporate "scrip, bonds and certificates of indebtedness," although by Section 1 of the act it is taxable for county purposes.

In the Court of Common Pleas of Dauphin County. No. 30 Commonwealth Docket, 1918. Appeal by defendant from the settlement of an account for tax on corporate indebtedness for 1914.

Wm. M. Hargest, Deputy Attorney General, for the Commonwealth.

Hause & Baker, for defendant.

KUNKEL, P. J., April 29, 1919:

This is an appeal by the defendant company from the settlement of an account against it for the loan tax for the year 1914. By agreement of the parties it was tried by the court without a jury. The facts have been agreed upon in a stipulation filed by the parties in the case.

The sole question presented is that of the defendant's liability for the tax on its indebtedness not represented by any obligation given by it to the person to whom the indebtedness was due, but appearing only in a statement contained in the company's books as cash advanced to it.

Section 1 of the Act of June 17, 1913, P. L. 507, imposes a tax for county purposes generally on indebtedness howsoever it may be evidenced, but excepts out of its provisions such loans as are made taxable by Section 17 of the act. Section 17 imposes a tax upon corporate "scrip, bonds and certificates of indebtedness" for State purposes, and Section 18 directs that such tax shall be collected as theretofore, that is by the corporation, as provided by Section 4 of the Act of June 30, 1885, P. L. 193. It is quite manifest that the indebtedness upon which the Commonwealth claims the tax, does not fall within the description of the subjects found in Section 17, "scrip, bonds or certificates of indebtedness." It is not evidenced by any such instruments or obligations. If not taxable under Section 17, there was no duty resting upon the defendant company to collect the tax thereon. Its liability for the tax could only arise out of its failure or neglect to assess and collect it. The indebtedness is covered rather by the general language of Section 1, and is not taken therefrom by the exception of the subjects made taxable by Section 17.

We conclude:

1. That the indebtedness as evidenced by the notation on the defendant company's books as cash advanced, was not subject to the loans tax for State purposes, imposed by Section 17 of the Act of June 17, 1913.
2. That such indebtedness is made taxable by Section 1 for county purposes.
3. That it was not the duty of the defendant company to collect the tax thereon.
4. That the tax thereon was collectible by the local authorities.
5. That the settlement against the defendant company for the tax is without authority of law.
6. That the defendant is entitled to judgment.

Wherefore judgment is directed to be entered against the Commonwealth and in favor of the defendant, unless exceptions be filed within the time limited by law.

MUTUAL LAUNDRY CO. v. CITY OF PITTSBURGH ET AL.

Municipalities—Water rents—Assessment—City council—Assessors—Injunction—Act of June 15, 1915, P. L. 976.

A demurrer to a bill alleging that the water rates established by a city were discriminatory and excessive was sustained and the bill dismissed on the ground of laches, where it appeared that plaintiff failed to institute the proceedings for relief until the city, for three successive years, had assessed and in part collected the water rents on the basis complained of and as fixed by ordinance.

A court of equity is not authorized to discharge the administrative duties of city officials, and cannot decree the rate at which the city shall supply water in the future.

Although water rents are not technically taxes they constitute part of the general revenues of the city, and the Act of June 15, 1915, P. L. 976, requires both to be taken into consideration in determining rates and millage. Having the necessary data, the city council performs the duty imposed and exercises the power conferred, and except for abuse of discretion, or disregard of legal duty, its acts cannot be reviewed by a court of equity, nor can its discretion be controlled or regulated by injunction.

Where a statute provides a method of appeal from the assessment of water rents by city officials, one aggrieved thereby must follow the method prescribed by the legislature, rather than invoke the equitable or other powers of the courts.

In Equity. Bill to restrain collection of water rents, and for the ascertainment and repayment of alleged excess rates or rents paid. Demurrer. No. 1992 July Term, 1918. Docket "D." C. P. Allegheny County.

W. W. Stoner and J. M. Stoner & Sons, for plaintiffs.

Stephen Stone, City Solicitor, *B. J. Jarrett* and *Harry Diamond*, Assistant City Solicitors, for defendants.

CARPENTER, J., January 31, 1919:

Plaintiff, alleging that the water rates or rents assessed against it by the City of Pittsburgh, and in part paid, are discriminatory and excessive, prays a decree enjoining the city from enforcing its claim for unpaid assessments and for the ascertainment and repayment of excess rates heretofore paid.

Pursuant to ordinance water rents for the year 1915, and prior years, were assessed at a "flat" rate, and thereafter pursuant to ordinance enacted in 1914 were assessed on a "meter" basis.

Plaintiff complains that it was compelled by the city to install a meter and that the council arbitrarily fixed certain rates per thousand gallons of water used, and has threatened and is threatening to enforce payment by legal process. It is alleged that the rates fixed and assessments made pursuant to said ordinances are excessive and discriminatory and in violation of plaintiff's rights. The right of defendant to engage in the business of selling water to its taxpayers and thereby make large profits is denied, but its right to make such rates or charges for water furnished as will yield a sufficient revenue to pay the cost and expense of operation and maintain a sinking fund sufficient to provide for depreciation, is admitted. There is no averment that the city makes large profits.

The bill refers specifically to the rates and rents charged for the years 1916, 1917, and that part of 1918 which had elapsed when suit was brought; prays that the rates be decreed unjust, unreasonable, excessive and discriminatory, and that the city be directed to repay such sum or sums as may be adjudged excessive.

Bills containing, in general, the same averments and praying similar relief have been filed by other plaintiffs, and all were heard at the same time.

To the several bills, defendants demur, assigning the following reasons:

- (1) Equity is without jurisdiction as to the matters set forth in plaintiff's bill.
- (2) An adequate remedy at law has been given the plaintiff.
- (3) Plaintiff has been guilty of laches.
- (4) Plaintiff is estopped from claiming or securing the remedies prayed for in plaintiff's bill.

The first and second grounds of demurrer challenge the jurisdiction. The power of a court of equity to prevent, by injunction, the enforcement of an invalid statute or ordinance is not doubtful. West's App., 64 Pa. 186; *Ex Parte Young*, 28 (U. S.) Sup. Ct. 441, and cases cited.

Conceding, as a general proposition, the jurisdiction of the court to determine the question of reasonableness of water rates

or rents charged by a municipal corporation, it does not follow that plaintiff is entitled to the relief sought. An Act of Assembly approved June 15, 1915, P. L. 976, amending certain sections of a supplement to a prior act, makes it the duty of council to determine the rate of taxes to meet current expenses of the city for the ensuing fiscal year. Section 5 provides, *inter alia*, that :

"Councils shall annually levy and fix a schedule of water rents or rates and the rents at which water will be furnished by meter . . . and shall have the right to require the use of meters, upon such terms and conditions as may be prescribed by ordinance, either in specified classes of users, or in certain sections of the city, or generally throughout the city ; and said board (of assessors created by council) shall have the power and authority of assessing the water rents or rates in accordance therewith."

The board is empowered to grant exonerations "upon such terms as may be prescribed by council."

The act provides for an appeal from any assessment to the full board of assessors sitting as a board of revision, and further provides that from the final decision of the board any dissatisfied party may appeal to the Court of Common Pleas.

It is not alleged that plaintiff appealed to the board and is contended by plaintiff's counsel that an appeal would avail nothing as the complaint is not against the action of the assessors but is against the action of council from which, they contend, there is no appeal. In a word, it is contended, the sole duty of the assessors is to discover, classify and assess in accordance with the requirements of the ordinance. Assessments under the flat-rate rule are made in advance. If the metered service rule applies the assessors ascertain the users and place them in the proper class ; the quantity of water used and the rate per thousand gallons being ascertained only after use and at stated periods. The bill avers that plaintiff is in the class designated "Industrial," for which a sliding or graduated scale of rates is annually fixed by council ; the rate for each of the several years mentioned in the bill ranging from 18 cents to 12 cents per thousand, dependent upon the number of gallons used.

Taking up in their order the several paragraphs of the bill necessary to an adjudication of the complainant's case, it is found that paragraphs 1, 2, 3, and 4 are merely introductory, and that paragraph 5 contains the first averment requiring discussion. It is alleged, in substance, that the ordinance operates to impose unjust and discriminatory charges against complainant in that it compels certain users of water to use same on metered service at an excessive charge, while others are permitted to use the water under substantially similar circumstances and conditions on the basis of a flat rate.

As we understand this paragraph it challenges the right of the council to exercise the power vested in it by the Act of 1915. The act says council shall have the right to require the use of meters . . . by "specified classes of users" . . . and "the power and authority of assessing the water rents or rates in accordance" with and upon "terms and conditions prescribed by ordinance." If the act is valid, and its validity is not questioned, it follows that unless council abused or transgressed the limits of the authority conferred, this paragraph does not present any fact calling for the exercise of the chancery powers of the court.

Paragraph 6 charges that the city arbitrarily selected certain users of water belonging to the industrial class, to which plaintiff belongs, and against their protest placed meters in their plants and thereafter ceased to assess them at the former flat rate and charged them upon the basis and at the rates provided in the several ordinances enacted for the years 1916, 1917, and 1918. It is further complained that during said period the greater part, both in number and amount of consumption, of the industrial consumers, were permitted to continue to use water on the flat-rate basis, and that many of them used equal or greater quantities than complainant. It is further claimed that the city collected from plaintiff sums of money largely in excess of the amount per gallon charged under its previous rates, notwithstanding the fact that the larger part of the industrial consumers were charged for water at the previously existing lower rates. It is also averred that said alleged exorbitant rates were paid under protest.

The bill does not pray that the city be restrained from assessing and collecting water rates or rents on the metered basis until it shall be shown that meters have been installed in all industrial

plants therein, but prays the court to decree the rates charged unjust, unreasonable, excessive and discriminatory, and ascertain, and direct repayment of, excess charge paid by plaintiff, and also "determine under what circumstances, conditions and at what rates water shall be supplied to plaintiff by the City of Pittsburgh in the future."

In reference to that part of the prayer quoted, it is sufficient to say the court is not authorized to discharge the administrative duties of city officials, and cannot decree the rate at which the city shall supply water in the future. If the bill is aimed at, and plaintiff's purpose is to question, the Act of 1915, that fact should be unequivocally stated. In the absence of any reference to the act the question of power to classify the users of water and compel the installation of meters is not involved.

Does the averment that the city arbitrarily selected certain users of water belonging to the industrial class and placed meters in their plants and charged them upon the meter basis established by ordinance call for the intervention of a court of equity?

To charge that the city selected certain users of water in the industrial class necessarily implies that the selection was made either by council or the assessors, but as the power vested in council is limited to classification the complaint can have reference to the action of the assessors only and from any alleged discrimination on their part complainant could have appealed. The assessors no more have the authority to discriminate between members of a class than they have to discriminate in rates. If, therefore, the complaint and prayer for relief is predicated on alleged discrimination by the assessors the act of assembly prescribes the course of procedure to obtain relief.

Paragraph 7 sets out the difference in charges under the two methods of assessment. Paragraph 8 charges that the rates are excessive and extortionate, in that the charge for the use of the maximum quantity of water provided in the ordinance is in excess of 12 cents per 1,000 gallons, whereas, it is alleged, the cost to the city of supplying same does not exceed four cents per 1,000 gallons, and the cost, including all the elements which can properly be taken into consideration as a basis for fixing rates would not exceed six cents per 1,000 gallons.

This paragraph presents the real cause of complaint, to wit: The alleged excessive rate; and the fundamental question involved, viz: the jurisdiction of the court.

A careful study of the entire bill compels the conclusion that upon no other ground than that of alleged excessive rates, can jurisdiction be sustained. For, as heretofore stated, the "discrimination" alleged refers to the action of the assessors, in that not all users of water in the class of consumers designated "industrial," have not been compelled to install meters. It is not alleged that the council selected individual users in the same class to whom water should be furnished by meter, but it is alleged that the larger part of the same class of consumers are charged a much less rate than that charged complainant. This averment considered apart from the next sentence in the same paragraph, and the averments in paragraph 9, would indicate an unjust discrimination between the users of metred water in the same class, but construed in connection with the averment that "the City of Pittsburgh is without authority to put in force the provisions of the ordinance No. 421, authorizing the general installation of meters for all water supplied by the city, as against a certain part of any class of consumers, unless the same be equally enforced against all other consumers using water under substantially similar conditions," it is manifestly intended as a denial of the right to assess water rates on a meter basis against the users in any class until every user in the class, or throughout the city, is furnished water on the same basis. It may be the phrase, "substantially similar conditions," limits the denial of authority to a mere denial of the right to assess any user of water on the meter basis unless and until all members of the class are assessed; or, in other words, that until all are, none is. The council having exhausted its authority by creating a board of assessors, classifying consumers, fixing a scale of assessments, etc., and providing for carrying the ordinances into effect, had no authority to select members of a class arbitrarily or otherwise, and if, as charged in paragraph 9, complainant "and a few other consumers" were "singled out for excessive exactions and discriminated against by the City of Pittsburgh in the charges imposed for the supply of water," the wrong was the wrong of the assessors, for the righting of which act of assembly (1915) provides an adequate remedy.

Recurring now to paragraph 8 which, as above stated, sets out the principal if not the only fact on which an argument in support of jurisdiction in equity can be bottomed, we find the complaint is that the city charges 12 cents per 1,000 gallons, whereas the cost of supplying said water does not exceed the sum of 4 cents per 1,000 gallons, and the further averment that the reasonable charge for supplying said water by the city, including all the elements which can properly be taken into account as a basis for fixing water rates, should not exceed 6 cents per 1,000 gallons. This averment presents the crux of the controversy. It cannot, however, be considered apart from other facts appearing in the bill nor from the powers vested in the municipality.

The complex machinery of modern municipal government makes it necessary to commit to departments and agencies the working out of details. Through these departments or agencies its administrative affairs are conducted, and of necessity there is vested in each department the exercise of discretion within prescribed limitations.

As above stated, the act of assembly authorizes and empowers the council to create a board of water assessors and directs that a sufficient number of employees to conduct the affairs of the board be provided, and further directs that council shall annually levy and fix a schedule of water rents or rates and the rents at which water will be furnished by meter. The first section of the act directs that taxes and water rents or rates in cities of the second class shall be levied and assessed annually and all appropriations shall be made annually by ordinance, prior to December 1st.

This section makes it the duty of departments of the city government to make reports of the receipts and expenditures of the several departments and also estimates of the probable revenues to be collected by, and the probable amounts required by, the respective departments for the ensuing year, upon such date prior to December 1st of each year as may be fixed by council. These reports, together with the report of the controller of the total amount from the city taxes and other revenues in prior years, and also the estimate by the city controller of the probable revenues of the ensuing fiscal year must be submitted for the purpose of enabling council to determine the amount of taxes and other revenues reasonably to be anticipated for the ensuing fiscal year

and to determine the rate of taxes or millage necessary to meet the current expenses for said ensuing year. Although water rents are not technically taxes they constitute part of the general revenues of the city and the statute requires both to be taken into consideration in determining rates and millage. Having the necessary data, the council performs the duty imposed and exercises the power conferred, and except for abuse of discretion, or disregard of legal duty, its acts cannot be reviewed, nor can its discretion be controlled or regulated by injunction. The act does not make it the duty of the board to provide the necessary funds to meet the expenses of its department nor does it limit the power of assessment to the creation of a fund to pay the expenses of its administration. Just discrimination requires the exercise of discretion. It is only unjust discrimination that warrants the interposition of the court.

If the installation of meters and the fixing of rates or rents is a lawful exercise of the power vested in the council, is the fixing of a scale of rates based on the quantity of water used, unlawful? We do not think it is. The act expressly authorizes the fixing of a minimum rate. The Supreme Court of the United States has said there is no cast iron line of uniformity which prevents a charge from being above or below a particular sum, or requires that the service shall be along exactly the same lines. *Western Union Tel. Co. v. Call Pub. Co.*, 181 U. S. 92. In *Southern v. Gloucester*, 187 Mass. 552, the court refer to and quote with approval from *Ladd v. Boston*, 170 Mass. 332, as follows:

"Considerable discretion in determining the methods of fixing rates is necessarily given by the statute to the water commissioner. Money must be obtained from water takers to reimburse the city wholly or in part for the expense of furnishing water. An equitable determination of the price to be paid for supplying water does not look alone to the quantity used by each water taker. The nature of the use and the benefit to be obtained from it, the number of persons who want it for such a use, and the effect of a certain method of determination of prices upon the revenues to be obtained by the city, and upon the interests of property holders are all to be considered."

The complainant is charged at the lowest rate per 1,000 gallons fixed by the meter scale. It was held in *Silkman v. The Board of Water Commissioners*, 152 N. Y. (Ct. of Apps.) 327, that when a statute confers the power to establish a scale of rates to be charged and paid by private consumers, etc., the question of consumption is one of the elements to be considered in determining rates and that it is not unreasonable for the water authorities to provide less rates when a large quantity of water is used than where a small quantity is used. And in *Parker v. City of Boston*, 1 Allen (83 Mass.) 631, the court say in reference to "suggested inequality resulting from the omission to place water meters in all the buildings in the city occupied as hotels when they were put into the houses of the plaintiff, it can not, if there is ground of complainant on that account, . . . affect the question of the validity of the ordinance or of the proceedings of the water board in this particular instance under it." The statute declared *inter alia*, that "The city council shall from time to time regulate the price or rent for the use of water," and stated that this regulation should be made with the view of deriving sufficient income for certain designated purposes. An examination discloses several points of similarity in that case and the case at bar. Several phases of the pending controversy are discussed fully in *Civic League v. St. Louis Water Department*, in *Public Utilities Reports*, Annotated, 1917 B, page 576.

In view of all the circumstances, and the elements which entered into and guided council in enacting the ordinances of which complaint is made, we are not prepared to say that the bill sets forth facts calling for the exercise of the injunctive power of the court. The fifth section of the Act of 1915 providing for appeals by any person, firm or corporation feeling aggrieved, also declares that court shall proceed at its earliest convenience to hear said appeal and "make such order and decree touching the matter complained of as may seem just and equitable." It is manifest, therefore, that in providing for appeals the legislature intended the court should exercise its equitable powers and to do so it must pass upon all questions involved. As further evidence of the legislative intent to afford full relief and protect the rights of all concerned it provided that appeals from assessments should not prevent the col-

lection of water rents, or rates, but in case of reduction the excess or over payment must be returned.

Defendant demurs upon the ground, inter alia, that the bill discloses laches on the part of the plaintiff. Laches is defined as such neglect or omission to assert a right, as taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity. This aptly describes the situation disclosed by the bill.

In view of plaintiff's knowledge of the facts and the failure to institute proceedings for relief until the city, for three successive years, had assessed and in part collected, the water rents on the basis fixed by the ordinance we think plaintiff is guilty of such laches as defeats this action even if the bill were otherwise sustainable.

Demurrer sustained and bill dismissed.

COMMONWEALTH OF PENNSYLVANIA *v.* THE SHENANGO FURNACE CO.

Corporations—Tax on capital stock—Ownership of shares of another corporation—Property located outside of State.

It has been the legislative policy of the State of Pennsylvania since 1868 to relieve from the personal property tax the shares of stock of corporations liable for tax on capital stock. The policy arose out of the recognized identity of the capital stock and the shares composing it as one and the same subject, so that the taxation of the one is the taxation of the other and to tax both would amount to double taxation.

Where the capital stock has not been taxed because it is represented by property permanently located outside of the State, the shares are taxable in the hands of the holder, for here there is no double taxation, and otherwise such shares would escape taxation altogether.

Appeal by the defendant from the settlement for the capital stock tax for the year 1914. Common Pleas of Dauphin County. No. 107, Commonwealth Docket, 1916.

Francis Shunk Brown, Attorney General, for the plaintiff.

George M. Hosack, for defendant.

KUNKEL, P. J., May 17, 1919:

The facts in this case are as follows:

The defendant is a corporation incorporated under the laws of this Commonwealth. It owns all the shares of the capital stock of the Shenango Steamship Transportation Company, also incorporated under the laws of this Commonwealth. The value of the shares thus owned, or of the entire capital stock of the transportation company is \$750,000; on \$25,000 of which the capital stock tax was paid for the year in question. No tax, however, was charged or paid on the remainder of the capital stock valued at \$725,000 because it was represented by property located outside of the State.

The account appealed from was settled October 20, 1916, in which the defendant company was charged with a tax amounting to \$4,001.09. It paid \$1,795.63, but objected to the payment of the remainder of \$2,305.46 on the ground that the latter amount was a tax on its capital stock represented by its shares of stock in the transportation company of the value of \$725,000 and that as that company had paid a tax on its capital stock the shares into which it was divided were not liable to taxation.

DISCUSSION.

Since 1868 it has been the legislative policy to relieve from the personal property tax the shares of stock of corporations liable for a tax on their capital stock. This appears from the Act of January 3, 1868, P. L. 1318, and from Sections 1 of the Act of June 1, 1889, P. L. 420; June 8, 1891, P. L. 229, and June 17, 1913, P. L. 507. The policy arose out of the recognized identity of the capital stock and the shares composing it as one and the same subject, so that the taxation of the one is the taxation of the other and that to tax both would amount to double taxation. Quoting from the last act, that of 1913, which imposes a tax upon the shares of stock in corporations, domestic and foreign, held or owned by individual residents or corporations of this State, the language, which is substantially the same as that in the previous act of assembly referred to, is: "except shares of stock in any . . . corporation . . . that may be liable to a tax on its shares or its capital stock for State purposes under the laws of

this Commonwealth or relieved from the payment of the tax on its shares or capital stock for State purposes by the laws of the Commonwealth."

The fundamental inquiry here is whether the shares of stock in the transportation company owned by the defendant company and representing part of the latter's capital stock are taxable under the facts in this case? It is quite clear that if the transportation company's capital stock composed of these shares has been taxed, the shares themselves cannot also be taxed, and the defendant's capital stock represented by them would not be liable for the tax here claimed. But the fact is, that \$725,000 of the capital stock of the transportation company has not been taxed. It is not liable to taxation because it was represented by property permanently located outside of the State. Not having been taxed the shares are not relieved from taxation. The statute only grants relief to the shares to the extent to which the capital stock is subjected to taxation. Here lies the difficulty with the defendant's contention. The transportation company has paid the tax on only a part of its capital stock. The defendant company owns all the shares. The tax on the remainder of the capital stock not having been paid, the shares in the hands of the defendant must answer for it. Unless taxed through its capital stock they would escape taxation altogether. We do not understand the statute to mean that when the tax has been paid on a part of the capital stock the shares into which it has been divided are wholly relieved of taxation. By a literal construction of the statutory provision, such a position might be sustained, but we are bound to construe it with due regard to the reason underlying its enactment and the purpose intended to be accomplished. As we have seen, the purpose was to avoid double taxation and the reason was the identity of the capital stock and the shares. To hold that the shares of the capital stock of a corporation, part of whose capital stock is not liable to taxation, are proportionately taxable is not to fall short of carrying out the full intention of the statutory provision.

It also suggested that, as capital stock and the shares composing it are to be treated as one and the same taxable subject, the taxation of the shares in the present case amounts to the taxation of property outside of the taxing jurisdiction of the State as much so as would be the taxation of the capital stock representing such

property. The identity of the two, however, was not intended to be effective except for the purpose of taxation only. Even for that purpose they were formerly held to be separate and distinct subjects. *Commonwealth v. Standard Oil Co.*, 101 Pa. 119. At that time the holders of shares of the capital stock were liable to taxation on their shares and the corporation also was liable to a tax on its capital stock in its corporate capacity. *Lycoming County v. Gamble*, 47 Pa. 106; *McKean v. County of Northampton*, 49 Pa. 519; *Whitesell v. County of Northampton*, 49 Pa. 526. If we were to extend the identity beyond what we have indicated and to the point suggested by the defendant, the result would be that the resident holders of shares of stock in corporations, whose capital stock is not in this State and not liable to taxation here, would be relieved from the payment of a tax on the shares held by them. Surely no such result was intended by the legislation to which we have referred.

The very question which we are discussing was raised and decided, with but little comment, against the present contention in *Commonwealth v. Westinghouse Air Brake Company*, 251 Pa. 12, on an appeal by that company. It may not be amiss therefore to repeat what was said by this court in that case:

"It is quite true in *Com. v. Fall Brook Coal Co.*, 156 Pa. 488; *Com. v. Lehigh C. & N. Co.*, 162 Pa. 603, and in *Com. v. U. G. I. Co.*, 162 Pa. 602, it was said, that there was no distinction to be made between capital stock and shares of capital stock, and that the taxation of the one was the taxation of the other. That, however, was only one of the reasons on which the decisions in those cases rested. They were placed also upon the provision of the taxing statutes which expressly excepted from taxation the shares of capital stock of corporations liable to the capital stock tax or exempted therefrom. Act of June 1, 1889; Act of June 8, 1891, P. L. 229. It was clear from the provisions in the statutes that there was no intention to impose a tax on both the capital stock and the shares of which it was composed, but the exact contrary appeared. We would be carrying the conclusion there reached far beyond what we think the court ever intended it should be carried, if we were to hold the shares of capital stock owned by a Pennsylvania corporation in other corporations not doing business in the State, and whose capital stock is not taxable in this

State, to be exempt from taxation. In speaking of the scheme under the statute for the taxation of stocks, Williams, J., in *Com. v. Fall Brook Coal Co.*, supra, said: "This scheme includes every share of the stock in corporations created by, or doing business in this State, wherever it may be owned, by imposing the tax on the corporation. It includes every share of stock in corporations which the State cannot reach that may be held by any taxpayer by requiring him to disclose his ownership and then assessing the shares he holds directly to him." Thus the shares of stock are only relieved from taxation when the capital stock itself is taxed. The double taxation referred to in the *Fall Brook* and other cases was that which would have resulted from the taxation twice by the same taxing power of what was regarded as the same subject. The case presented by this appeal is quite different. The subject of the tax here is the capital stock of the defendant company. Its capital stock is represented by the shares of stock which it holds in other corporations outside of this State. Those shares are taxable in this State, but the capital stock which they compose is not in this State and not subject to the taxing jurisdiction of this State. The statutory exception, therefore, does not apply. We are of opinion that the capital stock which is represented by shares of stock in the corporations which were not doing business in this State, and whose capital stock was not liable to taxation here, is taxable." 18 Dauphin Co. Rep. 174.

CONCLUSION.

Wherefore we conclude:

1. That the shares of stock in the transportation company of the value of \$725,000, held and owned by the defendant company, are not exempt from taxation.
2. That the capital stock of the defendant company represented by such shares is not relieved from, but is subject to the capital stock tax.
3. That the shares of stock in the transportation company and its capital stock composed thereof, is not to be treated as identical except for the purpose of avoiding double taxation.
4. That the Commonwealth is entitled to recover as follows:

Tax charged	\$4,001 09	
Amount paid	1,795 63	
Amount unpaid,		\$2,305 46
Interest from Dec. 20, 1916, 6 per cent. ..		328 58
Attorney General's coin, 5 per cent.		131 70
Total		\$2,765 74

for which sum judgment is directed to be entered in favor of the Commonwealth and against the defendant unless exceptions be filed within the time limited by law.

SUPREME COURT OF THE UNITED STATES.

NORTHERN PACIFIC RAILWAY COMPANY AND WALKER D. HINES,
AS DIRECTOR GENERAL OF RAILROADS, PLAINTIFFS IN ERROR,
v. STATE OF NORTH DAKOTA ON THE RELATION OF WILLIAM
LANGER, ATTORNEY GENERAL.

Railroads—Federal control—Intrastate rates—Right of Federal government to fix same—Jurisdiction of state court.

The Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918 dealing with the situation created by the exercise of such authority, show clearly that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question, including intrastate rates.

Although authority to regulate within a given sphere may exist in both the United States and in the states, when the former calls into play constitutional authority within such general sphere the necessary effect of so doing is, that to the extent that any conflict arises the state power is limited since in case of conflict that which is paramount necessarily controls that which is subordinate.

In the Supreme Court of the United States. No. 976 October Term, 1918. In error to the Supreme Court of the State of North Dakota. Reversed.

(Decided June 2, 1919.)

Mr. Chief Justice WHITE delivered the opinion of the court.

In taking over the railroads from private ownership to its control and operation, was the resulting power of the United States to fix the rates to be charged for the transportation services to be by it rendered subordinated to the asserted authority of the several states to regulate the rates for all local or intrastate business, is the issue raised on this record. It arises from the allowance by the court below, of a peremptory writ of mandamus commanding the Director General of the railroads, appointed by the President, and the officers of the Northern Pacific Railway Company to desist from charging for transportation in interstate business in North Dakota the rates fixed by the United States for such services. When this command was obeyed, the mandamus ordered that the Director General should thereafter exact for the services stated only lesser rates which were fixed in a schedule on file with the State Utilities Commission prior to the bringing of suit and which rates under the law of North Dakota could not be changed without the approval of the Utilities Commission. In the opinion of the court below it was stated that all the parties admitted that there was no question as to the jurisdiction to consider the controversy and that they all also agreed that no contention was presented as to the power of congress to enact the law upon which the controversy depended, as the correct interpretation of such law was the only issue to be decided. We consequently put those subjects temporarily out of view. We say temporarily, since even upon the assumption that issues concerning them necessarily inhere in the cause and cannot be waived by the parties, we could not decide concerning such issues without interpreting the statute, which we proceed to do.

On the 29th of August, 1916 (39 Stat. 645), congress gave the President power "in time of war . . . to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion, so far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." War with Germany was declared in April, 1917,

and with Austria on December 7th of the same year (40 Stat. 1, ib. 429). On December 26, 1917, the President, referring to the existing state of war and the power with which he had been invested by congress in August, 1916, proclaimed that

"Under and by virtue of the powers vested in me by the foregoing resolutions and statute, and by virtue of all other powers thereto me enabling, (I) do hereby . . . take possession and assume control at 12 o'clock noon on the 28th of December, 1917, of each and every system of transportation and the appurtenances thereof located wholly or in part within the boundaries of the continental United States and consisting of railroads and owned or controlled systems of coastwise and inland transportation engaged in general transportation, whether operated by steam or by electric power, including also terminals, terminal companies, and terminal associations, sleeping and parlor cars, private cars and private car lines, elevators, and warehouses, telegraph and telephone lines, and all other equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail-and-other systems of transportation; to the end that said systems of transportation be utilized for the transfer and transportation of troops, war material and equipment, to the exclusion so far as may be necessary of all other traffic thereon; and that so far as such exclusive use be not necessary or desirable such systems of transportation be operated and utilized in the performance of such other services as the national interest may require and of the usual and ordinary business and duties of common carriers."

By the proclamation a Director General of Railroads was appointed with full authority to take possession and control of the systems embraced by the proclamation and to operate and administer the same. To this end the Director General was given authority to avail himself of the services of the existing railroad officials, boards of directors, receivers, employees, etc., who were authorized to continue to perform their duties in accordance with their previous authority "until and except so far as such director shall from time to time by general or special orders otherwise provide." Limited by the same qualification the systems of transportation taken over by the government were made subject to ex-

isting statutes and orders of the Interstate Commerce Commission and to all statutes and orders of regulating commissions of the various states in which said systems or any part thereof might be located. In addition, however, to the limitation previously stated the proclamation in express terms declared: "But any orders, general or special, hereafter made by said director, shall have paramount authority and be obeyed as such."

The proclamation imposed the duty upon the Director General to negotiate with the owners of the railroad companies for an agreement as to compensation for the possession, use and control of their respective properties on the basis of an annual guaranteed compensation and with reservations in the interest of creditors, bondholders, etc. The proclamation in concluding declared that "from and after twelve o'clock on said twenty-eighth day of December, 1917, all transportation systems included in this order and proclamation shall conclusively be deemed within the possession and control of said director without further act or notice." Carrying out the authority exerted by the proclamation, the railroads passed into the possession, control and operation of the Director General.

On March 21, 1918, dealing with the subject congress passed a law entitled "An act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes." The opening sentences of the act declared: "The President having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carriers making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June 30, 1917."

Without going into detail it suffices to say that the first eight sections of the act comprehensively provided for giving effect to

the purposes just stated and in a general way contemplated affording what was deemed to be just compensation to the owners for the use of their property. In addition it empowered agreements in the interest of security holders of the railroads and sanctioned provisions deemed fair to the United States and to the owners of the property for betterments which might be required to be made during the term of control and for the return of the property when the government possession came to an end, which return was to be accomplished within a stated period after the cessation of war by the proclamation of the ratification of a peace treaty.

Beyond doubt also, for the purpose of enabling the United States to perform the obligations which it assumed and to secure it from ultimate loss from the pecuniary responsibilities which might result, including the repayment to it of an appropriation of \$500,000,000 which the act made applicable, all the earnings of the railroads were by the act expressly made the property of the United States.

The remaining eight sections of the act need not be stated; but as Section 10, which expressly provides for the power to fix rates, and Section 15, making certain reservations concerning the powers granted, were greatly relied upon in the opinion below and in the argument at bar, we reproduce in the margin the more relevant portions of Section 10 and the text of Section 15.*

*"Section 10. . . . That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination.

"Said rates, fares, charges, classifications, regulations and practices shall be reasonable and just and shall take effect at such time and upon such notice as he may direct, but the Interstate Commerce Commission shall upon complaint, enter upon a hearing concerning the justness and reasonableness of so much of any order of the President as establishes or changes any rate, fare, charge, classification, regulation, or practice of any carrier under Federal control, and may consider all the facts and circumstances existing at the time of the making of the same. In determining any question concerning any such rates, fares, charges, classifications, regulations, or practices or changes therein, the Interstate Commerce Com-

On May 25, 1918, the Director General made an order establishing a schedule of rates for all roads under his control and covering all classes of service, intrastate as well as interstate. The order made these rates effective on designated dates in the month of June and they were continuously enforced during a period of about eight months up to the 14th of February, 1919, when the bill in this case was filed by the State Utilities Commission for mandamus against the Director General and the officers of the Northern Pacific Railway, asserting the want of power in the United States over intrastate rates and the exclusive right of the State of North Dakota to fix such rates for all intrastate business done in that state. The Director General, admitting that he had made the order complained of and had collected the rates earned thereunder and paid them into the treasury of the United States, sustained his action and denied the alleged right of the state upon the legislation and official acts which we have stated. The Northern Pacific denied interest on the ground that its railway had passed under Federal control and that it was receiving the compensation therefor which had been agreed on between itself and the United States. It alleged that the rates under the

mission shall give due consideration to the fact that the transportation systems are being operated under a unified and coördinated national control and not in competition.

"After full hearing the commission may make such findings and orders as are authorized by the act to regulate commerce as amended, and said findings and orders shall be enforced as provided in said act: Provided, however, that when the President shall find and certify to the Interstate Commerce Commission that in order to defray the expenses of Federal control and operation fairly chargeable to railway operating expenses, and also to pay railway tax accruals other than war taxes, net rents for joint facilities and equipment, and compensation to the carriers, operating as a unit, it is necessary to increase the railway operating revenues, the Interstate Commerce Commission in determining the justness and reasonableness of any rate, fare, charge, classification, regulation, or practice shall take into consideration said finding and certificate by the President, together with such recommendations as he may make."

"Sec. 15. That nothing in this act shall be construed to amend, repeal, impair, or affect the existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may affect the transportation of troops, war materials, government supplies, or the issue of stocks and bonds."

order complained of had been collected by the Director General through agents appointed by him who were not officials of the company and therefore it had no responsibility concerning them. The prayer was that it be dismissed from the suit.

Taking the case under the complaint, the returns and the exhibits, the court, as we have previously stated, two of its members dissenting, denied the authority of the United States and upheld that of the state, and the mandamus was made peremptory as to both the Director General and the officers of the Northern Pacific Railway. We are thus brought to the question whether the state authority controls the power of the United States as to intrastate rates.

No elaboration could make clearer than do the Act of Congress of 1916, the proclamation of the President exerting the powers given, and the Act of 1918, dealing with the situation created by the exercise of such authority, that no divided but a complete possession and control were given the United States for all purposes as to the railroads in question. But if it be conceded that despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control, there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came and all the other duties and exactions which the act imposed, contemplating one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace for the period provided the private ownership theretofore existing. This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them which was plainly essential to the authority given was not included in it.

Conclusive as are these inferences, they are superfluous, since the portion of Section 10 as previously reproduced in the margin in express terms confers the complete and undivided power to fix rates. The provision is this: "That during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regu-

lations, and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations, and practices shall not be suspended by the commission pending final determination." These quoted words are immediately followed by provisions further defining the power of the Commission and its duty in the premises, so as to enable it beyond doubt to consider the situation resulting from the act and to which the rates were to be applied. The unison between that which is inferable and that which is expressed demonstrates the true significance of the statute.

A brief consideration of the contentions relied upon to the contrary will at once show either their inappositeness, the mistaken premises upon which they rest, or the errors of deduction upon which they proceed. It is argued that as state control over intrastate rates was the rule prior to the enactment of the statute creating United States control, the statute must be interpreted in the light of a presumption that a change as to state control was not made. But in view of the unambiguous provision of the statute as to the new character of control which it created, the principle of interpretation applied in its ultimate aspect virtually was: that because the statute made a fundamental change, it must be so interpreted as to prevent that change from becoming effective.

Besides, the presumption in question but denied the power exerted in the adoption of the statute, and displaced by an imaginary the dominant presumption which arose by operation of the Constitution as an inevitable effect of the adoption of the statute, as shown by the following:

(a) The complete and undivided character of the war power of the United States is not disputable. *Selective Draft Law Cases*, 245 U. S. 366; *Ex parte Milligan*, 4 Wall. 2; *Legal Tender Cases*, 12 Wall. 457; *Stewart v. Kahn*, 11 Wall. 493. On the face of the statutes it is manifest that they were in terms based upon the war power, since the authority they gave arose only because of the existence of war, and the right to exert such authority was to cease upon the war's termination. To interpret, therefore, the exercise of the power by a presumption of the continuance of a state power limiting and controlling the national authority was but to deny its existence. It was akin to the contention that the supreme right to raise armies and use them in case of war did

not extend to directing where and when they should be used. (*Cox v. Wood*, 247 U. S. 3.)

(b) The elementary principle that under the Constitution the authority of the government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indispensable. This being true, it results that although authority to regulate within a given sphere may exist in both the United States and in the states, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises the state power is limited, since in case of conflict that which is paramount necessarily controls that which is subordinate.

Again, as the power which was supreme, to interpret it upon the basis that its exercise must be presumed to be limited was to deny the power itself. Thus, once more it comes to pass that the application of the assumed presumption was in effect but a form of expression by which the power which congress had exerted was denied. In fact, error arising from indulging in such erroneous presumption permeates every contention. To illustrate: Because in *Reagan v. Mercantile Trust Co.*, 154 U. S. 413, and other cases unnecessary to be referred to, it was held that it would be presumed that congress in creating a corporation intended that it should be subject to applicable state laws and regulations so far as congress did not otherwise provide, therefore, because congress had taken over to the Government of the United States property to be used by it in the performance of a governmental function, congress must be presumed to have intended that such property (and such function) should continue to be subject to and controlled by state power.

The confusion produced is again aptly illustrated by the rule of interpretation by which it is insisted that the express power to fix rates conferred by the statute was rightly disregarded. Thus, while admitting that the power which was conferred to initiate rates when considered in and of itself included all rates, it is nevertheless said that such power must be presumed to be limited to the only character of rates which under the prior law the Interstate Commerce Commission had the power to consider, that is, interstate rates, because the new rates when initiated were to be acted upon by that body. As, however, the statute in terms gives

power to the Interstate Commerce Commission to consider the new rates in the light of the new and unified control which it creates, the error in the contention becomes manifest, even putting out of view the fact that by the effect of the duty imposed and the new control created the new rates applying to the new conditions were within the purview of the power which the Interstate Commerce Commission previously possessed. Certainly, to mistakenly disregard one provision of the statute intended to give effect to another and upon that basis to decide that the statute is not enforceable, cannot be said to be a correct interpretation. And this view is also true as to the application which was made of the asserted presumption to the excepting clauses of Section 15 previously reproduced in the margin, since that section in the light of the purpose to retain the prior law is interpreted so as to cause it to be but an additional means of destroying the all-embracing power to initiate rates fixed by Section 10.

It follows that the judgment below was erroneous. The relief afforded against the officer of the United States proceeded upon the basis that he was exerting a power not conferred by the statute, to the detriment of the rights and duties of the state authority, and was subject thereto to be restrained by state power within the limits of the statute. Upon the premise upon which it rests, that is, the unlawful acts of the officers, the proposition is undoubted, but in view of our conclusion that the acts of the officers complained of were authorized by the law of the United States, the question arises how far, that being established, it results that the suit was one against the United States over which there was no jurisdiction within the rulings in *Belknap v. Schild*, 169 U. S. 10; *Postal Supply Co. v. Bruce*, 194 U. S. 601; *Louisiana v. McAdoo*, 234 U. S. 627; *Minnesota v. Hitchcock*, 185 U. S. 373; *Wells v. Roper*, 246 U. S. 335.

The principle of these cases however can only be applicable by giving effect to the conclusion we have reached as to the legality of the acts of the officers which were complained of, and to decide which question the United States was not a necessary party. This is undoubtedly true unless it can be said that the contentions concerning the want of power in the officers were so unsubstantial and frivolous as to afford no basis for jurisdiction and hence caused the suit to be from the beginning directly against the

United States. As however we are of the opinion that there is no ground for that view, it follows that the case as made gave jurisdiction to dispose of the question of wrong committed by the officials and that a decree giving effect to our conclusion on that subject will dispose of the entire case.

Our decree therefore must be and it is

Reverse and remand for further proceedings not inconsistent with this opinion.

Mr. Justice BRANDEIS concurs in the result.

DAKOTA CENTRAL TELEPHONE CO. ET AL., PLAINTIFFS IN ERROR,
v. STATE OF SOUTH DAKOTA EX REL. BYRON S. PAYNE, AT-
TORNEY GENERAL ET AL.

*Telephone companies—Federal control—Intrastate rates—Power
of Federal government to fix same—Police powers of State.*

The resolution of Congress of July 16, 1918 (40 Stat. 904, Ch. 154), authorizing the President to take possession and assume control of telegraph and telephone systems was a lawful exercise of its war powers and confers upon the Federal government the right to fix all rates, intrastate as well as interstate.

The provision saving "the lawful police regulations of the several states" cannot be interpreted so as to reserve to the states the right to regulate intrastate rates, as to do so would limit if not destroy Federal control.

In the Supreme Court of the United States. No. 967 October Term, 1918. In error to the Supreme Court of the State of South Dakota.

(Decided June 2, 1919.)

Mr. Chief Justice WHITE delivered the opinion of the court.

Involving as this case does the existence of state power to regulate, without the consent of the United States, telephone rates for business done wholly within the state over lines taken over into the possession of the United States and which by the exercise

of its governmental authority it operates and controls, it does not in principle differ from the North Dakota case just announced where it was decided that under like conditions the state had no such power as to railroad rates. We consider this case as far as may be necessary, by a separate opinion, however, because the authority under which the control was exerted is distinct and because of the assumption in argument that this distinction begets a difference in the principles applicable.

In January, 1919, the State of South Dakota on the relation of its attorney general and railroad commissioners sued the Dakota Central and other telephone companies doing business within the state to enjoin them from putting into effect a schedule of rates as to local business which it was alleged had been prepared by the Postmaster General and which it was averred the telephone companies were about to apply and enforce. It was charged that such rates were higher than those fixed by state authority and that the proposed action of the companies would be violative of state law, since the companies were under the duty to disregard the action of the Postmaster General and apply only the lawful state rates. The duty of the relators, as state officers, to prevent such wrong was alleged—a duty in which, it was further asserted, the state had a pecuniary interest springing from the expenditure which it was obliged to make for telephone services.

The companies answered, disclaiming all interest in the controversy on the ground that by contract, a copy of which with one of the defendant companies was annexed, their telephone lines and everything appurtenant thereto had passed into the possession and control of the United States and were being operated by it as a governmental agency. The answer also alleged that any connection of the companies through their officials or employees with the business was solely because of employment by the United States. The purpose to enforce the rates fixed by the Postmaster General was admitted and it was averred that the suit was one over which the court had no jurisdiction because it was against the United States.

The case was heard on the bill, answer, exhibits and an admission by all parties that the contract annexed to the answer was ac-

curate and that a similar one had been made with all the other defendants.

Assuming that congress had power to take over the telephone lines; that it had conferred that power upon the President; that the power had by the President been called into play conformably to the authority granted, and that the telephone lines were under the complete control of the United States, the court yet held that the state had the power to fix the local rates. In reaching this conclusion the court, assuming argumentatively that the right which the United States possessed gave at least the implied authority to fix all rates, nevertheless held that such power did not embrace intrastate rates because they had been carved out of the grant of power by congress in conferring authority on the President. It was therefore decided that the President, the Postmaster General and those operating the telephone service under his authority were mere wrongdoers in giving effect to the rates fixed by the Postmatser General and in refusing to enforce the conflicting intrastate rates made lawful by state law. The proceedings to prevent this wrong, it was held, did not constitute a suit against the United States and the injunction prayed was granted.

The appellees do not confine their contention to the question of statutory construction below decided. On the contrary, they press questions of power which the court below assumed and did not pass upon and insist upon a construction of the statute contrary to that which the court below took for granted as a prelude to the question of construction upon which it based its conclusion.

We must dispose of the issues thus insisted upon before testing the soundness of the interpretation of the statute upon which the court below acted, and for the purpose of considering them as well as the question of construction which the court below expressly decided we state the case.

On the 16th of July, 1918, congress adopted a joint resolution (40 Stat. 904, Ch. 154), providing:

"That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio sys-

tem or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: Provided, that just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President; . . . Provided further, that nothing in this act shall be construed to amend, repeal, impair, or effect existing laws or powers of the states in relation to taxation or the lawful police regulations of the several states, except wherein such laws, powers, or regulations may effect the transmission of government communications, or the issue of stocks and bonds by such system or systems."

Six days thereafter, on the 22d of July, the President exerted the power thus given. Its exercise was manifested by a proclamation which after reciting the resolution of congress, declared:

"It is deemed necessary for the national security and defense to supervise and take possession and assume control of all telegraph and telephone systems and to operate the same in such manner as may be needful or desirable;

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General. . . ."

The proclamation gave to the Postmaster General plenary power to exert his authority to the extent he might deem desirable through the existing owners, managers, directors or officers of the telegraph or telephone lines, and it was provided that their services might continue as permitted by general or special orders

of the Postmaster General. It was declared that "from and after twelve o'clock midnight on the 31st day of July, 1918, all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice."

Under this authority the Postmaster General assumed possession and control of the telephone lines and operated the same. On the 31st day of October, 1918, the President through the Postmaster General, in the exertion of the duty imposed upon him by the resolution of congress to make compensation, concluded a contract with telephone companies of the most comprehensive character covering the whole field while in possession, control and operation by the United States continued. By its terms stipulated amounts were to be paid as consideration for the possession, control and operation by the United States and the earnings resulting from such operation became the property of the United States. Although concluded in October, 1918, by stipulation the contract related back to the time when the President took over the property.

Following this by authority of the President, the Postmaster General fixed a general schedule of rates and it was the order to put this schedule in effect which gave rise to the suit, the trial, and the resulting judgment which we have now under consideration.

That under its war power congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the North Dakota railroad case. And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in congress to confer upon the President the authority which it gave him.

The proposition that the President in exercising the power exceeded the authority given him is based upon two considerations. First, because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority; indeed, the contention goes further and assails the motives which it is asserted induced the exercise of the power.

But as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power. This must be since, as this court has often pointed out, the judicial may not invade the legislative or executive departments so as to correct alleged mistakes or wrongs arising from asserted abuse of discretion.

The second contention, although it apparently rests upon the assertion that there was an absence of power in the President to exert the authority to the extent to which he did exert it, when it is correctly understood amounts only to an asserted limitation on the power granted based upon a plain misconception of the terms of the resolution of congress by which the power was given. In other words, it assumed that by the resolution only a limited power as to the telephone lines was conferred upon the President, and hence that the assumption by him of complete possession and control was beyond the authority possessed. But although it may be conceded that there is some ground for contending, in view of the elements of authority enumerated in the resolution of congress, that there was power given to take less than the whole if the President deemed it best to do so, we are of opinion that authority was conferred as to all the enumerated elements and that there was hence a right in the President to take complete possession and control to enable the full operation of the lines embraced in the authority. The contemporaneous official steps taken to give effect to the resolution, the proclamation of the President, the action of the Postmaster General under the authority of the President, the contracts made with the telephone companies in pursuance of authority to fix their compensation, all establish the accuracy of this view, since they all make it clear that it was assumed that power to take full control was conferred and that it was exerted so as to embrace the entire business and the right to the entire revenues to arise from the act of the United States in carrying it out. Indeed, congress in subsequently dealing with the situation thus produced would seem to have entertained the same conception as to the scope of the power conveyed by the resolution and dealt with it from that point of view. (Act of Oct. 30, 1918; 40 Stat. 1017.)

This brings us to the proposition upon which the court based its conclusion, that is, that although complete possession, exclusive control, and the right to all the revenues derived from the operation of the business were in the United States as the result of the resolution, the proclamation, and the contracts, yet as to intrastate earnings, the state power remained to "encumber" the authority of the United States, because that situation necessarily resulted from the terms of the congressional resolution.

This superficially was based on an interpretation of the resolution, but in substance was caused by the application to the clause of the resolution interpreted, of the erroneous presumption as to the continuance of state power dealt with in the North Dakota case. Let us see if this is not necessarily so. The provision dealt with was the proviso of the resolution which in the first place saved "the lawful police regulations of the several states" and therefore subjected the control of the United States to the operation of such power; and in the second place prohibited the states during the United States control from exerting authority as to the issue of stocks and bonds.

It was conceded that the words "police power" were susceptible of two significations, a comprehensive one embracing in substance the whole field of state authority and the other a narrower one including only state power to deal with the health, safety and morals of the people. Although it was admitted that the reservation, considered intrinsically, was not susceptible of benign interpretation in the broader of the two lights, it was held that it was necessary to so interpret it because of the clause of the proviso prohibiting the states from legislating concerning the issue of stocks and bonds by the companies during the United States control. The reasoning was this: It was inconceivable, it was said, that the subject, stocks and bonds, should have been withdrawn from state control by an express prohibition unless that subject would have been under state control in the absence of the prohibition, a result which could only exist by giving the saving clause as to police power its widest significance. But the fact that the rule of construction applied had the result of incorporating in the act of congress unlimited state authority merely as the result of a prohibition by congress against the exertion of state power in a specific instance, in and of itself admonishes of the incorrectness

of the rule. But its want of foundation is established by two further considerations: (1) because it causes the provision as to stocks and bonds, which was plainly enacted to preserve the financial control of the United States over the corporations, to limit if not destroy such control; (2) because by converting the prohibition against state power into an affirmative and comprehensive grant of that power, it so interprets the act as to limit the grant of authority which the act beyond doubt gave to the United States. These considerations not only show the mistake of the interpretation, but also point out the confusion and conflict which must necessarily arise from giving effect to the mistaken presumption of the continuance of state power to which we have previously referred.

Inherently the power of a state to fix rates to be charged for intrastate carriage or transmission is in its nature but derivative, since it arises from and depends upon the duty of those engaged in intrastate commerce to charge only reasonable rates for the services by them rendered, and the authority possessed by the state to exact a compliance with that duty. Conceding that it was within the power of congress, subject to constitutional limitations, to transplant the state power as to intrastate rates into a sphere where it, congress, had complete control over telephone lines because it had taken possession of them and was operating them as a governmental agency, it must follow that in such sphere there would be nothing upon which the state power could be exerted except upon the power of the United States, that is, its authority to fix rates for the services which it was rendering through its governmental agencies. The anomaly resulting from such conditions adds cogency to the reasons by which in the North Dakota case the error in presuming the continuance of state power in such a situation was pointed out and makes it certain that such a result could be brought about only by clear expression or at least from the most convincing implication.

This disposes of the case, but before leaving it we observe that we have not overlooked in its consideration the references made to proceedings in congress concerning the resolution at the time of its passage, and further, that we have also considered all the suggestions made in the many and voluminous briefs filed on behalf of various state authorities and individuals having interests

in suits pending elsewhere, concerning the construction of the resolution. In saying this, however, we must except suggestions as to want of wisdom or necessity for conferring the power given, or as to the precipitate or uncalled for exertion of the power as conferred, from all of which we have turned aside because the right to consider them was wholly beyond the sphere of judicial authority.

In view of our conclusion we shall in this case, as we did in the previous one and for the reasons therein stated, content ourselves with reversing the judgment below upon the merits with directions for such further proceedings as may be not inconsistent with this opinion.

And it is so ordered.

Mr. Justice BRANDEIS dissents.

PUBLIC SERVICE COMMISSION OPINIONS.

CITY OF PITTSBURGH *v.* PITTSBURGH RAILWAYS CO.

Crossings—Above grade—Temporary structure approved.

The construction of a temporary structure over the tracks of the Union Railroad was approved by the Commission, and the operation of the cars of the respondent thereover was authorized.

COMPLAINT DOCKET No. 1571.

Report and Order of the Commission.

Charles K. Robinson, for complainant.

Andrew W. Robertson, for respondent.

By THE COMMISSION, April 28, 1919:

Under the direction of the Commission, the bureau of engineering has been engaged in securing the coöperation of the several parties interested in the repair of the Thompson run viaduct,

upon which the tracks of the Pittsburgh Railways Company crosses over the tracks of the Union Railroad. It now appears to the Commission that this viaduct has been so repaired and reconstructed that it is capable of carrying ordinary vehicular and street car traffic, and the Commission therefore approves this construction and the operation of the cars of the Pittsburgh Railways Company over this crossnig. The present viaduct was constructed with the understanding that all the parties interested would submit to this Commission plans for the construction of a permanent viaduct upon which this highway should be carried over the tracks of the Union Railroad, and upon the presentation of these plans the Commission will take such action as is necessary in regard to the construction of the proposed crossing, which will replace the temporary one now in use.

There has also been submitted to the Commission a plan for a slight alteration in the location of timber bents separating the present viaduct designated to permit the Union Railroad Company to relocate certain of its tracks, and the Commission, after investigation of this plan, approves the proposed alteration to be made at the expense of said railroad company.

By the Commission,

WM. D. B. AINEY, *Chairman.*

CHAMBER OF COMMERCE OF COATESVILLE, CITY OF COATESVILLE v.
WEST CHESTER STREET RAILWAY CO.

*Street railways—Rates—Increase of—Alleged to be unreasonable
—Municipal ordinance fixing same—Inadequate service—
Transfers,*

Rates fixed by municipal ordinance must give way to those found by the Commission to be reasonable.

The Commission has no authority to order one street railway company to issue transfers from its system to that of an independent company.

The respondent submitted a reproduction value of \$1,325,715. The Commission deducted from this amount \$240,565 for accrued depreciation, and \$27,150 for property not now used or useful in the business of the re-

spondent. The balance, \$1,058,000, which was practically the market value, was used in considering the reasonableness of rates without making a valuation.

It being shown that by reason of increased operating expenses the former rates were inadequate to produce sufficient revenue to pay the necessary expenses and provide for fair return, the six-cent rate was approved until May 1, 1920, and the complaint dismissed.

COMPLAINT DOCKET NOS. 1949 AND 1951.

Report and Order of the Commission.

Walter E. Greenwood, for the City of Coatesville.

William Tregay, for the Chamber of Commerce of Coatesville.

A. M. Holding, for respondent.

ALCORN, Commissioner:

These two cases were heard together and will be disposed of as one.

The West Chester Street Railway Company posted a new schedule of passenger fares, effective February 18, 1918, advancing the rate in each fare zone from 5 to 6 cents. Both complaints allege that this new rate is unjust and unreasonable and that the service in Coatesville and between Coatesville and West Chester is inadequate.

In addition the City of Coatesville alleges that the rate is in violation of the ordinance of November 17, 1903, and is therefore illegal and void. It requests the Commission to make an order requiring the respondent to issue and receive transfers to and from the Conestoga Traction Company.

We are advised by the complainants that the Commission need not consider the complaint as to the inadequacy of service owing to the fact that the inauguration of the eight-hour day has so changed the situation that there is no occasion for any extra cars in the late morning and early evening hours. In view of this the complaint as to inadequacy of service will be dismissed.

We have already in *Wilkinsburg v. Pittsburgh Railway Company*, Complaint No. 1883, P. U. R. 1918 F, 131, determined that an ordinance providing for the rate of fare does not prevent the

Commission from inquiring into and fixing what is a reasonable rate. This decision is controlling, and the complaint based upon the ordinance will be dismissed.

The Conestoga Traction Company, operating in a part of Coatesville, is independent of the respondent. The Commission holds that it has no authority under the Act of July 26, 1913, to require one street railway company to issue transfers from its system to that of another independent company. Section 1 of Article V of that act authorizes the Commission to order a company to grant transfers to or from one part of the system of the same common carrier to another part. We are prohibited by the act from ordering any connection or transfer between different street railway corporations engaged in the business of carrying passengers where they are not engaged in the general business of transporting freight. The respondent in this case is engaged in the general business of transporting passengers and we cannot therefore under the law compel the respondent to issue or receive transfers to and from the Conestoga Traction Company. The complaint in this respect will be dismissed.

The respondent was incorporated in April, 1890, and at various times thereafter constructed its lines into the City of Coatesville, and from there to and through the Borough of Downingtown to the Borough of West Chester, and through the said borough, with an interurban service to the Borough of Kennett Square. The system consists of 28.688 miles, divided into 11 fare zones of different lengths. There are two divisions known as Coatesville and Kennett divisions. The regular schedule on each division is hourly with half hourly cars from Coatesville to Downingtown from 6:30 a. m. until 5:30 p. m.

The respondent did not submit any statement of original cost. It was claimed that the historical cost was not available. It appears that the road was constructed and equipped by the Tennis Construction Company, and the contractor was paid for the entire property, including the sum paid for acquiring the rights of nine railway companies and two lighting companies, \$1,000,000 in 40-year first mortgage 5% bonds, and \$900,000 of the capital stock of the respondent, the total issue being \$1,000,000. The reproduction value submitted by the engineers of the respondent, using five-year unit prices 1913-1918, inclusive, was \$1,325,715. De-

ducting therefrom the accrued depreciation of \$240,565 leaves a total present value of \$1,085,150. From this should be deducted \$27,150, the cost of the Lenape power house which is not useful at the present time. This would give a present value of \$1,058,000 for the bare physical cost of the property. Various items of intangibles respondent argues should be added to this amount to produce the true reproduction value new less depreciation. It is not necessary to give any consideration to these items. The bonds of the company have been marketed at 93% and the stock has sold at \$7 per share. This would indicate a market value of \$1,070,000.

Without determining the fair value of respondent's property we may assume that it is not less than \$1,050,000. This would be at the rate of \$35,000 a mile, a very conservative figure in that locality. According to the testimony there has been a gradual and steady growth of income and expenses for several years. The industrial activity in the Coatesville district has added very greatly to the gross income. The increased expenses of operation however exceed the increase in revenue. The average income of eight years, 1908-1915, was \$140,141.17. The gross revenue for 1916 was \$173,680.38, and for 1917, \$190,455.46. The operating expenses, including taxes, averaged for the years 1908-1915, \$81,632.97, for 1916 they were \$93,469.56, and for 1917, \$123,431.76. This shows that while the gross revenue increased about \$16,000 in 1917 over 1916 the operating expenses for the same time increased \$30,000. The net earnings for 1916 were \$80,210.82, and for 1917, \$67,023.70. It was in evidence that the operating expenses for 1918 would be still higher than those of 1917, so if the respondent had been required to operate in 1918 on the 5-cent fare it would be impossible for it to earn sufficient revenue. No evidence was submitted of any estimate of the earnings under the increased rate of fare. The bureau of engineering of the Commission however calculated that if the same number of passengers were carried in 1918 as in 1917 it would require the new rate of 6 cents per zone to produce sufficient revenue to meet the higher operating expenses and maintain the road properly and give a fair return to the company.

At the present time and under the conditions existing it would not seem that the rate of 6 cents per zone was too high. There are nearly 29 miles of track, and a person traveling over the entire

distance would pay 66 cents. This is about $2\frac{1}{4}$ cents a mile. This does not appear unreasonable.

The Commission is of the opinion that the increased rate is just and reasonable and is necessary in order to provide the company with sufficient revenue to meet the increased expenses of operation. The complaint will therefore be dismissed and the company will be permitted to continue the rate of fare now in force, namely: 6 cents per zone, until May 1, 1920. By that time expenses of operation may be so reduced that the company might be able to return to the 5-cent rate. An order will be made accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of facts and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, April 22, 1919, It is ordered: That the respondent, the West Chester Street Railway Company, be permitted to continue the rate of fare now in force, namely: 6c per zone, until May 1, 1920.

It is further ordered: That the complaint in this case be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

CITY OF NEW CASTLE *v.* MAHONING & SHENANGO RY. & LIGHT CO.

Street railways—Rates—Increase of—Alleged to be unreasonable—Municipal ordinance fixing same—Inadequate service.

A municipal ordinance granting a franchise to a street railway company and providing the rate of fare to be charged, does not preclude the Commission from fixing a higher rate which is found to be reasonable.

The net earnings of the respondent having decreased as a result of increased operating expenses, the Commission concluded from the evidence submitted, without determining the value of the respondent's property, that the new rates would produce only sufficient revenue to provide for the payment of operating expenses, depreciation, taxes and fair return. The new rates were approved until May 1, 1920, when the old rates will again become effective unless the respondent then show that the new rates are still required.

The features of service complained of being largely due to abnormal war conditions, the complaint was dismissed.

COMPLAINT DOCKET No. 1840.

Report and Order of the Commission.

James A. Gardner, for complainant.

Ralph J. Baker, for respondent.

ALCORN, Commissioner:

The Mahoning & Shenango Railway & Light Company, as lessee, operates the New Castle Electric Street Railway and the New Castle & Mahoning Street Railway in the City of New Castle. It filed a tariff and schedule of rates for these lines effective January 15, 1918, increasing the fare from 5 to 6 cents and providing for tickets in packages of 11 for 60 cents and school tickets to be used between the hours of 7:30 a. m. and 5:30 p. m., in packages of 50 for \$1.50.

The City of New Castle in its original complaint against these new rates alleged that they being contrary to the ordinances of April 29, 1890, and April 1, 1905, were invalid, and that the company had no right to exact them. It did not charge that the new rates were unjust or unreasonable. Subsequently on February 7, 1918, the Commission allowed the complainant to amend its com-

plaint so as to raise the question of the reasonableness of the new rates. It was further alleged that the service was inadequate.

The ordinance of April 29, 1890, provides that councils shall have the power to reduce the fare for a single passage to 5 cents whenever in its judgment the earnings of the company justify such action. The ordinance of April 1, 1905, required the company to sell tickets in packages of 11 for 50 cents, and 22 tickets for \$1, and 100 student tickets for \$3.

As to the ordinances fixing the rate which the respondent should charge or which authorize the councils of the City of New Castle to adjust the rate we need only refer to our previous decision in *Wilkinsburg v. Pittsburgh Railway Company*, Complaint Docket No. 1883, P. U. R. 1918 F, 131, 6 P. C. R. 281. In that proceeding the Commission held that an ordinance granting the franchise to a street railway company which provides the rate of fare to be charged does not preclude it from inquiring into the reasonableness of any rate and final determination of the rate of fare the railway company is entitled to receive. This decision is controlling and disposes of the complainant's contention with respect to the ordinances.

The testimony as to the inadequate service was of a general character relating to the roadbed being out of order, the track joints being uneven and the cars being old and dilapidated. It was practically admitted by the respondent that during 1917, owing to the difficulty of procuring labor and material, some repairs had been neglected or postponed. The Commission will not make an order in reference to the service, as the testimony is not definite enough to determine how many or what cars should be repaired or what portion of the roadbed should be put in order, but we will impress upon the respondent that as the conditions which excused it during 1917 from properly repairing its cars and roadbed are now somewhat changed and as labor and material can now be secured, it is the duty of the company to furnish good service and to keep the cars and roadbed in proper condition.

The important question for our determination is, whether the rates which the company put into effect January 15, 1918, are just and reasonable.

The complainant did not offer any evidence relating to the rates of fare. It merely submitted the two ordinances and an

advertisement in a local paper prepared by the company for the purpose of disposing of preferred stock. The advertisement gave a very glowing account of the prosperous condition of the respondent and how well secured the 7% preferred stock would be. The statements of the company however in this respect could hardly be taken as relevant to the determination of the revenue which the company is entitled to receive for service rendered by operating a street passenger railway in the City of New Castle. The respondent, as lessee or owner, operates numerous utilities, street railway lines, light and power companies, and natural gas companies in various portions of the State of Pennsylvania and Ohio. The revenues which the advertisement referred to would be from all these various operations and not from the street railway lines in the City of New Castle alone. We do not consider the advertisement as having any material bearing upon the present controversy. The actual figures as appear from the evidence showing the earnings of the company must be controlling. The respondent's evidence consisted principally of a number of exhibits for the purpose of showing the effect upon the net revenues of the company by increased operating expenses. No evidence of original cost or reproduction cost new was given. The respondent claimed a minimum or conservative valuation of \$1,150,600, based upon a value of \$30,000 per mile for 23 miles of track, \$6,000 a mile for overhead equipment and the value of 51 cars, inspection barn and substation.

The position of the respondent was that the increased rate was necessary in order to meet the increased costs of operation. It is not necessary to refer minutely to the various exhibits offered by the respondent as it will be sufficient for our purpose to consider the net earnings as shown by those exhibits.

The net earnings for 1914 were \$63,181; for 1915, \$46,052; for 1916, \$84,502; for 1917, \$48,014. The increased fare became effective January 15, 1918. At the time of the hearing the actual receipts for nine months of 1918 were \$234,922. It was estimated that for the entire year the annual gross receipts under the six-cent fare would be \$334,900. The gross receipts for the year 1917 under the five-cent fare were \$286,644. The respondent argued that the estimated annual gross revenue for 1918 would not be the actual receipts because in the latter part of 1918

the influenza epidemic would render it highly improbable that this estimated gross revenue would be realized.

There is some confusion in the tabulated statements and the figures vary somewhat. While the respondent gives estimated gross receipts under the 6-cent fare for 1918 as \$334,900, it proceeds to argue, because of various injurious conditions such as the influenza epidemic and severe weather, that the actual receipts will be less than those estimated, and it calculates that for the year 1918 at the 6-cent fare it may realize \$316,180. One of the respondent's witnesses estimated that if the lines had been operated during 1918 at a 5-cent rate the net receipts would be \$31,510, and at a 6-cent rate \$58,010. This is shown by respondent's Exhibit No. 7. The net revenue for 1916 was \$84,502. That for 1917 after there had been some increases in wages and material, was \$48,014. If the estimate that the net earnings in 1918 upon a 5-cent fare would be \$31,510 be correct, then there would have been a considerable further reduction in net revenue. If the net revenue of 1916, \$84,502, was only sufficient to provide for depreciation, taxes and a fair return, then it is very evident that the net earnings of 1917 and those that would have accrued in 1918, if the fare had remained at 5 cents, would be very inadequate. The evidence of the respondent that this deduction in net revenue is due entirely to increased costs of operation is not disputed. The Commission has knowledge that during 1916 and 1917 the wages of the employees and the cost of all material had risen very much, and it is self-evident that a revenue which was sufficient prior to these increases in cost of operation would not be sufficiently remunerative to meet the additional cost. The pay roll alone in New Castle increased from 1915 to 1917 about \$17,000. There was an increase also in taxes and in the cost of power and labor and materials used for equipment and repairs. The increases in operating expenses are not controverted, but the complainant contends that the method of determining the operating expenses is not fair to the citizens of New Castle. The respondent operating numerous lines of railways and other utilities does it through one organization or management and from consolidated plants the power is furnished. This necessitates some method of apportioning some of the expense so that the total operating expenses may not be strictly accurate. It appears how-

ever that the method of determining the share of expenses allotted to the operation of the railway in New Castle is not injurious to the street railways in New Castle, but charges them with less expense than would be incurred if the respondent was operating under a separate management and received power from an independent plant located in New Castle. The organization of the respondent tends to economy and efficiency.

It is not necessary to determine the fair value of the respondent's property in the City of New Castle, as the statements of receipts and expenses furnish us sufficient data to determine whether the new rates are just and reasonable. If the 6-cent rate will produce a net revenue of \$58,000 it would be \$16,000 less than the net revenue for 1916, and only \$10,000 more than that of 1917. From this amount would be deducted taxes, which are stated to be \$8,000, an item for depreciation, and the balance would be the return the company would receive.

The Commission is of the opinion that the new rates will not produce more revenue than will be sufficient to provide for operating expenses, taxes, depreciation, and a fair return. It appears that in previous years the respondent was doing a successful business and receiving a fair income. In 1916, for instance, the net revenue was \$84,502. This shows that under normal conditions the 5-cent rate is sufficient. As the respondent asks for the increased rates because of the increased cost of operation it should if permitted to put the new rates into effect, restore the old rate when the conditions become normal. The new rates cannot be considered excessive. A passenger can by purchasing a package of tickets ride for less than 5½ cents. This is not under present conditions, as disclosed in this case, too high.

We are of opinion that in view of the increase in operating expenses the new rates are just and reasonable, and we will permit the respondent to collect those rates until May 1, 1920, and an order will be entered dismissing the complaints and requiring the company to restore the old rate after May 1, 1920, unless it be shown that the company then requires the revenue which the new rates produce.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of facts and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, April 22, 1919, *It is ordered*: That the respondent, the Mahoning & Shenango Railway & Light Company be permitted to collect its rates filed with the Commission and effective January 15, 1918, until May 1, 1920, at which time it is ordered to restore its old tariff and schedule of rates, in force and effective prior to January 15, 1918, unless it be shown that the company then requires the revenue which the new rates produce.

It is further ordered: That the complaint in this case be and the same hereby is dismissed by the Commission.

By the Commission,

WM. D. B. AINEY, *Chairman*.

JOHN W. MASTELLER ET AL. v. NORTH BRANCE TRANSIT CO.

Rates—Tariff schedules—Posting and publishing same.

A tariff which has been posted in numerous places accessible to the public and which has been seen and read by the complainant, will not be set aside by the Commission on the ground that it was not filed, posted and published in accordance with the provisions of the Public Service Company Law.

COMPLAINT DOCKET No. 2578.

Report and Order of the Commission.

G. M. Tustin, for respondent.

Fred. Ikeler, for respondent.

BY THE COMMISSION:

On or before December 1, 1918, the respondent company filed with this Commission a schedule of rates to take effect January 1, 1919, which provided for a number of changes in the charges for its service, and on December 27, 1918, a number of residents of the district served by the respondents filed a complaint alleging that the proposed rates were unjust, unreasonable, and excessive, and that the tariff had not been filed, posted, and published in accordance with the requirements of the Public Service Company Law. Upon this complaint and answer the Commission held hearings, and by agreement of the parties the matter is now to be disposed of on the preliminary question raised as to whether the tariff publication is in compliance with law.

From the testimony it appears that the transit company posted in its office in Bloomsburg, on November 30, 1918, a copy of the proposed tariff which it had filed with the Commission, and on December 1, 1918, placed in the waiting room of its office a large notice calling the attention of the public to the fact that increased rates would become effective on January 1st, and that copies of the tariff could be seen at the office. These notices were also posted on December 1, 1918, in the cars of the company, in a number of shelter sheds, and on poles at the termini of the various divisions of the system. In addition, the company caused to be published in one of the leading newspapers an article setting forth the new rates and explaining the company's reason for making the increases.

The complainants in this proceeding visited the office of the company, inspected the tariff of proposed rates and attached to the complaint which they filed with this Commission prior to the effective date of the rates, a copy of this tariff. In so far as they are concerned, therefore, the public notice given by the company accomplished every purpose that the legislature intended; the public were informed of the fact that the rates were to be increased and of the amount of the proposed increase in sufficient time to enable them to protest to this Commission and place upon the public service company the burden of justifying the increased rates.

The complaint in this case, in so far as it relates to the filing, posting, and publishing of the tariff in question, will, therefore,

be dismissed and the matter will be set down for further hearing on the other questions involved.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the dates hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, May 6, 1919, It is ordered: That the complaint in this proceeding be and the same hereby is dismissed, in so far as it relates to the filing, posting, and publishing of the tariff in question;

And it is further ordered: That the complaint as to other matters contained therein be set down for further hearing.

By the Commission,

WM. D. B. AINEY, *Chairman.*

ALLIED PRINTING TRADES COUNCIL, CITY OF SCRANTON ET AL. v.
SCRANTON RAILWAY COMPANY.

*Street railways—Rates—Increase of—Alleged to be excessive—
—Municipal ordinance fixing same—Zones.*

The rates of the respondent were increased from 5 to 6 cents, and later to 8 cents per zone. Certain changes were also made in the zones. Various complaints were made against these changes and it was contended that the increased rates were in violation of a municipal ordinance fixing same.

The Commission held that the existence of a municipal ordinance fixing rates did not prevent it from establishing other rates found by it to be reasonable.

It was shown that the operating expenses of the respondent had greatly increased so that the old rates were wholly inadequate to produce sufficient return. Traffic also had largely fallen off as a result of increased rates.

Without making a valuation of the property of the respondent, the Commission concluded that an income of \$1,831,000.00 was necessary to maintain its service and solvency. The respondent was accordingly ordered to establish a rate of 7 cents for a period of one year, and concurrently therewith to sell four tickets for 25 cents for a period of six months, at the expiration of which time such action will be taken as the facts seem to justify.

In the meantime the value of the property of the respondent is to be determined and monthly reports required. The question of zones will be disposed of in another report.

COMPLAINT DOCKET NOS. 1668, 1678, 1687, 1689, 1690, 2351,
2365, 2433, 2434.

Report and Order of the Commission.

R. S. Houck, City Solicitor, for the City of Scranton.

Walter L. Schanz, for Allied Printing Trades Council, Joseph Oliver et al.

J. E. Walkins, for Borough of Taylor.

P. L. Walsh, for Boroughs of Throop and Archbald.

W. L. Houck, for Borough of Blakely.

J. B. Jenkins, for Borough of Carbondale.

H. B. Gill, *C. P. O'Malley*, *H. A. Knapp*, and *John P. Kelly*, for the Scranton Railway Co.

O'Brien & Kelly, by *W. J. Fitzgerald*, for Scranton & Binghampton Ry. Co.

AINY, Chairman:

These complaints relate to fare increases. The respondent increased its rates on street railway service from five to six cents, effective September 7, 1917, but not put into actual effect until March, 1918, and later from six to eight cents, effective September 15, 1918, and made certain changes in its zones on its inter-urban lines between Scranton and Carbondale.

Complaints Nos. 1668, 1678, 1687, 1689, and 1690 were directed against the increase to six cents. Complaints Nos. 2351 and 2365 to the eight-cent rate. Complaints Nos. 2433 and 2434 were against both increases.

Complaints by Borough of Blakely (C. 2393) and by the City of Carbondale (C. 2543) were made against readjustment of zones, and also against the increase in rates, and will be disposed of in so far as they relate to readjustment of zones in another report.

The initial complaints against the increase from five to six cents were predicated upon the existence of municipal consent ordinances fixing five-cent rates of fare, but this feature was disposed of by the Commission in orders heretofore made, and in consonance with its report and order in the Wilksburg case, P. U. R. 1918 F, 131, need not be further discussed. Other features of these complaints attack the reasonableness of the increased rates, and all matters with respect to rates may be disposed of by this report and order.

At the hearing it was early developed that the increases asked by respondent were to meet the unusual conditions imposed by reason of war, and the largely increased costs of labor, material and power which the company was obliged to meet. It was therefore suggested that as the company faced an "emergency" situation, which might be changed by a leveling of these conditions, the Commission would not likely be inclined to establish rates to be effective for a longer period than one year, in order that at the expiration of that time such readjustment in rates could be made as the then situation would warrant and require.

No valuation of the physical properties of the respondent was made nor submitted, although complainants were afforded and accepted the opportunity to examine the books of respondent and its constituent companies so far as these books were in existence. That examination was rather extensive, and the results were carried into our record and furnish the basis of a rather elaborate somewhat voluminous brief on the part of the complainants, but as the accountant who made it stated, "I don't wish to be understood as maintaining that the figure which I have placed here is a final figure or a figure which represents the actual value of the property as carefully and finally determined as a basis for rate-making."

We agree with complainants that upon this we are not able to determine the fair value of respondent's property, for it is insufficient to predicate a determination of the fair value of the used

and useful property for rate-making purposes. We may, however, find it of some assistance in determining certain features hereinafter referred to, with respect to the reasonableness of the rates under attack.

We turn to the testimony concerning the operating expenses and revenues of the company for such light as they may throw upon the matters under consideration.

From complainants' Exhibit No. 40 it appears that the passenger revenues of the company from 1914 to 1917, inclusive, were respectively \$1,381,669.81, \$1,334,549.65, \$1,393,892.38, \$1,459,187.85, although respondent maintains that the same exhibit shows, by reference to the revenue passengers carried, \$16,000.00 less each year than the amounts above set forth.

Complainants' Exhibit No. 37 shows an increase in operating expenses ranging from \$826,879.28, in 1914, to \$955,075.76, in 1917.

In November, 1917, there was an increase in employees' wages from thirty cents to thirty-three cents per hour, and effective June 2, 1918, a further increase by direction of the National War Labor Board to forty-one cents per hour for men employed three months, forty-three for men employed up to nine months, and forty-five for men employed for a longer period (platform men). A general increase was also made for all other employees, car barn men, track men, etc., the lowest rate of wages being fixed at forty-two and one-half cents per hour. This made an increase in operating expenses in and of itself of \$240,000.00 to \$250,000.00 per year on the basis of employees then on the pay roll, and if a full quota of men such as the company usually employed were on the pay roll, it would require an additional sum of about \$50,000.00, and these figures are additional to the sum of about \$60,000.00 per year, the result of the three-cent per hour increase made by the company. The company obtains the power to operate its cars from the Scranton Electric Company, which in August, 1918, increased its rates with the result of an annual increase in expense for this service of about \$52,644.00 (rounded in some of the submitted figures to \$50,000.00, and at other places \$52,000.00). It would thus appear that the increase in operating expenses, includ-

ing \$10,000.00 for increase in costs of materials, would aggregate \$372,644.33 over the current expense of 1917.

It was claimed by respondent that maintenance costs had increased by \$80,000.00 (testimony, p. 38), and still further increased to \$125,000.00 at the time of argument; this figure did not include wages estimated at \$50,000.00 for additional employees required to meet the company's operating necessities. From these figures the respondent deduces a figure required for operation of \$1,389,575.76, to which they add \$60,000.00 for taxes.

The complainants summarize the operating expenses and taxes at \$1,320,452.29 (p. 172 of brief), but it is pointed out that this does not include two items of increase in wages made by company, \$52,500.00 (ten and one-half months), and increased costs of maintenance, \$80,000.00, which would bring this total to \$1,452,952.29 on this basis. There is a slight discrepancy in these figures, for in some instances they are rounded, but in final analysis the complainants and respondent on this feature of the case are not far apart. We may fairly assume that the company must earn, in order to meet its operating expenses and pay its taxes (excluding an item of \$122,000.00 for deferred maintenance), the sum of \$1,452,952.29.

It is not disputed that the company is entitled to earn a fair return upon its property devoted to public use. The complainants, while opposing any allowance for fair return in the absence of a valuation of the property, suggest upon the data submitted by its accountant that if the rate of return be computed upon an estimated value of \$4,000,000.00 at six per cent. it would allow \$240,000.00 for that purpose. Were we to adopt this basis, although as pointed out the complainants do not attempt to establish this as being the correct amount, it would yield at seven per cent. \$280,000.00, or a total required revenue of \$1,732,952.29. Over against this we have the actual operating experience of the company in 1917, when its earning at the rates then in effect were \$1,529,856.33, complainants' Exhibit No. 37, or \$1,526,500.05, respondent's Exhibit R, leaving a deficit of \$203,095.96. Manifestly a larger revenue is required, for it clearly appears then that the company could not continue its existence and meet its operating responsibilities on a five-cent rate of fare.

With respect to the amount of \$4,000,000.00 as a rate base, it does not include any of the so called intangibles, any allowance for working capital, nor recognition of going concern values.

We are of the opinion, under all the evidence in the case, that an annual passenger revenue of \$1,831,000.00 is not too much for this company to receive out of applied rates in order to maintain its service and its solvency.

Now comes the more serious question of how it shall obtain this amount. It is becoming more and more apparent that rates imposed may not mean rates collected. In the last analysis the public have the right to accept or reject the rates. They can accept or refuse the service. Scranton is a rather compact city. The urban lines of respondent are comparatively short and hence the riders are not so wholly dependent upon car service as in many other localities of the State. If they do not ride the company suffers the loss.

An eight-cent fare has been hardly sufficient to meet the company's requirement, and it has earned the gross amount at a material loss in patronage. The total number of passengers carried in 1917 was 28,856,158. Since the eight-cent fare went into effect there has been a serious loss in this riding habit ranging from forty-four per cent. in October (no doubt influenced by the epidemic then prevalent), to twenty-eight per cent. in the last two weeks of November, and twenty-three per cent. the first two weeks of December.

Over against this figure of 28,856,158 passengers in 1917, we have this fact that the company was over many years prior thereto realizing an annual increase in the number of car riders. Had nothing occurred to disturb the ratio, it might properly have anticipated an increase in 1918, 1919, and 1920. The respondent states in brief (p. 13) "of course the raising of the rate of fare decreases the number of passengers carried." A material loss in the number spells ultimate disaster to any company, and a rate should be levied with the two thoughts in mind, if possible to be realized, to produce sufficient revenue and to retain the car riders.

An eight-cent rate of fare has been paid by about 23,000,000 riders per year. If no more than that number will ride a seven-cent fare will be wholly inadequate to meet the company's needs—

26,000,000 would be required. At six cents over 30,000,000 riders must be provided.

Any rate which we may impose must be in a sense experimental, but we cannot ignore the fact that there were at one time nearly 29,000,000 riders.

Under all the circumstances we conclude that the company shall file a tariff—

First: For a seven-cent rate of fare.

Second: That for a period of six months they shall provide coupon tickets to be sold, four tickets for twenty-five cents ($6\frac{1}{4}$ cents).

This is upon the following computation :

10% of 29,000,000 will pay 7 cents ..	\$203,000 00
90% of 29,000,000 will pay $6\frac{1}{4}$ cents ..	1,631,000 00
	<hr/>
	\$1,834,000 00

which would yield, substantially, the prescribed amount.

It should be pointed out that the success or failure and consequent continuance of the $6\frac{1}{4}$ -cent feature will be dependent upon the patronage received. Monthly reports will be required of the company, covering receipts, expenditures, and traffic data. If at the expiration of the six months' period the patronage is sufficient to warrant a continuance of the coupon tickets, it will be so ordered, but if the revenue produced is found insufficient, the rates will be readjusted in the light of then conditions.

This company is in all probability greatly over-capitalized. It has outstanding capital stock, \$2,000,000.00, and bonds of various issues and maturities \$7,395,500.00; total \$9,395,000.00, but which we have not taken into consideration in fixing the rate of return. We think it advisable that the rates which this company shall ultimately charge should be predicated upon a valuation of the properties devoted to public service, as to this we are in accord with the complainants and respondent. If complainants and respondent can agree upon a program for the joint conduct of such a valuation proceeding, the Commission will designate an engineer to sit in conference with them to aid in a determination of the original costs and cost of reproduction new.

In so far as the complainants of the City of Carbondale and the Borough of Blakely, with respect to zoning are concerned, they will be separately disposed of, but to the extent that they cover complainants with respect to rates, they are covered by this report. An order will be made in accordance with this report.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaints and answers on file, and having been duly heard and submitted by the parties, and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, April 22, 1919, the Scranton Railway Company is ordered to file with the Public Service Commission, not later than May 7, 1919, a tariff schedule, effective on one day's prior notice, providing for a seven-cent rate of fare, to remain in force for the period of one year, and concurrently for a period of six months, a six-and-one-fourth-cent rate of fare where coupon tickets in blocks of four are purchased, which tickets shall be put on sale by respondent at its offices and with its conductors, and at the expiration of the six months' period the same to be modified, continued or abandoned, by the order of the Commission, as the intervening experience of the company may warrant; to file with the Commission monthly reports of the receipts, expenditures, and traffic data. A valuation of respondent's property is to be made, and the respondent is directed to prepare and file with the Commission a complete inventory of its physical property. If a valuation conference can be agreed upon between representatives of complainants and respondent, the Commission will designate an engineer to sit with them for the purpose of determining the reproduction cost new and original cost; their report to be submitted to the Commission for further consideration and order.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF THE CITY OF OIL CITY.

Crossings—At grade—No necessity therefor.

The Commission refused to permit the applicant to extend a street across the right of way of a railroad company, thereby creating a grade crossing over two main tracks and two sidings, there being no manifest and unavoidable necessity for the same.

APPLICATION DOCKET NO. 2243—1918.

Report and Order of the Commission.

E. C. Breene, for applicant.

C. H. Bergner and *Spencer Gilbert Nauman*, for protestant.

BY THE COMMISSION :

The City of Oil City on July 8, 1918, enacted an ordinance extending Mineral street across the right of way of the Pennsylvania Railroad Company to the Allegheny river. By the present application we are asked to approve a grade crossing over two main tracks and two sidings of a railroad, upon which there are daily frequent train movements.

For many years it has been the settled policy of the State of Pennsylvania as administered by the courts, to permit of no grade crossing of a railroad over a public highway, except in case of manifest necessity.

In *P. & L. Railroad Co. v. Lawrence County*, 198 Pa., p. 7, the Supreme Court held :

“It must therefore be accepted as the settled policy of the State as administered by this court, that whenever the subject comes within its jurisdiction and control no grade crossing of a railroad over another railroad or a common highway will be permitted except in case of manifest and unavoidable necessity.”

In *Frackville Borough v. P. & R. Ry. Co.*, 32 C. C. Rep., p. 554, the court after citing the above, held :

"We think the same rule is fully applicable when an attempt is made to open a street across a railroad track at grade."

Under the law giving the Commission exclusive jurisdiction in matters of this nature we are required to find and determine, before granting approval, that the crossing is necessary and proper for the service, accommodation, convenience, and safety of the public. The weight of the testimony is against such finding. The proposed grade crossing would be used only by employees and persons having business with the Pittsburgh Filter Manufacturing Company, which company has now a private crossing over the tracks and right of way of the railroad company, affording it adequate crossing facilities. No manifest and unavoidable necessity for this crossing has been shown. An order will therefore be entered refusing approval.

Now, to wit, April 7th 1919, It is ordered: That the Certificate of Public Convenience prayed for be, and the same hereby is refused and the application dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATIONS OF WILLIAM HAPE AND ABEL T. DYMOND.

Autobusses—Insufficient business for two.

The Commission granted a Certificate of Public Convenience to one Abel T. Dymond, mail carrier, permitting him to operate an autobus as a common carrier in connection with his mail route, but refused to grant a similar certificate of one William Hape, for the reason that there was not sufficient business to warrant the granting of both applications.

APPLICATION DOCKET NOS. 2430, 2435—1919.

Report and Order of the Commission.

John J. Kelley, for applicant.

John R. Sharpless, for protestant.

BY THE COMMISSION :

The applicants in these proceedings apply for the right to operate autobusses as a common carrier for the transportation of passengers over the same route, viz: between the City of Hazleton and the village of Sybertsville, Luzerne County.

From the testimony offered at the hearing we find the following facts :

I

The Commission on May 4, 1916, issued a Certificate of Public Convenience evidencing its approval of the right to operate automobiles as a common carrier over and upon this route to one H. J. Kress.

II

H. J. Kress about two years ago sold his automobile and transferred a mail route between Sybertsville, Conyngham, and Hazleton to the applicant, Abel T. Dymond, who from the date of purchase continued to furnish autobus service and transport passengers between said places under advice of his counsel that the Certificate of Public Convenience issued to the said Kress could be, and was transferred to him.

III

An automobile transportation service between Hazleton, Conyngham, and Sybertsville is necessary for the service, accommodation and convenience of the public.

IV

There is not sufficient business to warrant the granting of both application.

V

The protests filed by the Lehigh Traction Company against the granting of a certificate to either of the applicants have been withdrawn on the condition that local passengers will not be transported between the City of Hazleton and the Borough of West Hazleton.

Under this statement of facts we are limited to the inquiry as to which one of the applications should be approved. We are of the opinion from the testimony presented that the application of Abel T. Dymond should be approved and the application of William Hape refused. An order will therefore be issued in accordance with this determination.

ORDER.

These matters being before the Public Service Commission of the Commonwealth of Pennsylvania upon petitions and protests on file, and having been duly heard and submitted by the parties and due investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof :

Now, to wit, May 5, 1919, It is ordered:

1. That the application of William Hape (A. 2430—1919) for a Certificate of Public Convenience be and the same is hereby refused.

2. That the application of Abel T. Dymond (A. 2435—1919) be and the same is hereby approved, and that a Certificate of Public Convenience be issued evidencing the Commission's approval of and permission granted to Abel T. Dymond to operate one (1) Stanley Steamer Company autobus having a seating capacity of 15 passengers, Maker's number 1576; two (2) Ford touring cars, seating capacity 4 passengers each. Maker's numbers, respectively, 31513 and 2051605, for the transportation of persons or property as a common carrier over and upon the following route: Starting at the town of Sybertsville, Luzerne County, on the public highway, thence through the Borough of Conyngham, thence through the Borough of West Hazleton, and thence into the City of Hazleton, and return to the above mentioned places; subject to the condition that the said Abel T. Dymond shall comply with all the provisions of the Public Service Company Law as now existing, or as may hereafter be amended, and the special rules hereto attached and made a part hereof, governing the operation of autobus lines as at present prescribed by the Commission,

or as may hereafter be adopted by it; and to the further condition that the said Abel T. Dymond shall not transport local passengers between the City of Hazleton and the Borough of West Hazleton in a competition with the line of the Lehigh Traction Company between said places.

By the Commission,

WM. D. B. AINEY, *Chairman.*

THATCHER MANUFACTURING COMPANY v. THE PENNSYLVANIA
RAILROAD COMPANY AND W. G. MCADOO, DIRECTOR GENERAL
OF RAILROADS.

Reparation—Excessive freight paid on shipments of sand.

The Commission ordered the Pennsylvania Railroad Company to pay to the Thatcher Manufacturing Company \$858.85, as reparation, because of the unjust, unreasonable, and excessive collections of the railroad company for the transportation of glass sand within two years prior to December 30, 1918.

COMPLAINT DOCKET No. 2587.

Report and Order of the Commission.

F. E. Baldwin and *E. J. Baldwin*, for complainant.

Charles H. Bergner, for respondent.

BY THE COMMISSION:

This is a proceeding in which the Thatcher Manufacturing Company asks the Commission to make an order of reparation for excessive freight paid by it on shipments of glass sand moving from the Mapleton district to the Kane district.

The testimony discloses that this Commission, at Complaint Docket No. 1708—American Window Glass Company v. Pennsylvania Railroad Company—found and determined that the rate of \$1.68 per net ton charged by the Pennsylvania Railroad Company for the transportation of glass sand from the Mapleton district to Kane was excessive and unreasonable to the extent that it exceeds the rate of \$1.54 per net ton for transportation of

building and moulding sand between the same points. In that proceeding it was determined that the rate on glass sand should not exceed the rate concurrently in effect on other grades of sand shipped from the Mapleton district to Kane.

The complainant in this proceeding is a manufacturer of bottles, and the record discloses that within the period of two years prior to the date of filing the petition in this proceeding, it had paid to the respondent for the transportation of glass sand from the Mapleton district to Kane, \$858.85 more than it would have been required to pay if the just and reasonable rates determined by the Commission had been charged. It is upon this excessive payment that it asks the Commission to award it damages in this proceeding.

The amount of the excessive payments, the fact that they were paid by the petitioner herein and the dates and amounts of the various shipments were not contested by the respondent, but it alleged that the complainant was not entitled to damages because it had received a profit on its product which had been sold based upon the freight rate which the complainant petitioner paid. The carrier contends that the complainant must show a damage in addition to the fact that it has paid the excessive rate, but with this contention we do not agree. The freight rate charged by the respondent was excessive, unjust and unreasonable, and that amount having been paid by the complainant in this proceeding is a measure of the damage which he has suffered. We are not able to agree with the contention of the respondent that this is ruled by the decision in *P. R. R. v. International Coal Company*, 230 U. S. 207, which was an action for damages due to discrimination. Here the complainant actually suffered the loss when it paid the amount of the excessive charges, and we therefore find and determine that the Thatcher Manufacturing Company has been damaged in consequence of the unjust, unreasonable and excessive collections of the Pennsylvania Railroad Company, as above set forth, to the amount of \$858.85, and an order of reparation will therefore issue, awarding and directing the payment of \$858.85.

The rate established by the Commission for the transportation of glass sand was not made effective until March 10, 1919, and during the period between the filing of the petition in this pro-

ceeding and that date the complainant was compelled to continue to pay the excessive and unreasonable rate which had been in effect. No proof was presented to the Commission showing the amount so paid, and we are therefore not in a position to make an order for reparation covering the shipments made during this period. If the parties interested can not agree upon the amounts due for these shipments, the Commission will make a further order upon presentation of the necessary proof.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, May 6, 1919, the Pennsylvania Railroad Company is hereby ordered and directed, within thirty (30) days from the date of this order, to pay to the Thatcher Manufacturing Company the sum of eight hundred and fifty-eight dollars and eighty-five cents (\$858.85), being the damages actually sustained by said company because of the unjust, unreasonable and excessive collections of the respondent for the transportation of glass sand mentioned in said report, within two years prior to December 30, 1918.

By the Commission,

WM. D. B. AINEY, *Chairman.*

C. W. DEAN *v.* ABINGTON ELECTRIC COMPANY.

Electric companies—Service—Refusal to render same—No legal obligation on respondent—Territory not covered by charter.

The Commission can make no order requiring an electric company to render service in a territory in which it has no charter right to engage in business.

COMPLAINT DOCKET No. 2576.

Report and Order of the Commission.

George Morrow, for complainant.

F. C. Hanyen, for respondent.

BY THE COMMISSION:

The complainant, C. W. Dean, resides in West Abington Township, Lackawanna County, where he owns two dwelling houses, a barn, a garage and a blacksmith shop which he has wired and equipped for electric lights and for other household conveniences.

He has constructed a pole line about one and two-tenths miles in length to the service wires of respondent company and now complains that the respondent has refused to render him service over this line.

The respondent admits some of the allegations and denies others, and offers to render service but upon terms which the complainant says would be objectionable to him and therefore prohibitive. It appears from the evidence and from an inspection of the respondent's articles of incorporation that the latter is authorized to furnish electric service in South Abington Township (out of which the Borough of Clark's Summit was erected) and in the Boroughs of Dalton and Waverly, in Lackawanna County, and in the Borough of Factoryville, in Wyoming County, but not in West Abington Township, where complainant resides.

It further appears that for a year and a half prior to the filing of this complaint, the complainant was negotiating with respondent for electric service under circumstances substantially as follows: The respondent manufactures no electricity, but procures the current which it distributes to its patrons from the Scranton & Binghamton Railway Company. Near the Borough of Factoryville, one branch of the railway company's power line extends to that borough and beyond, while the other branch passes through the complainant's farm and near the buildings for which service is desired, extending on to Lake Winola. On this latter line the railway company has not strung any service wires by which it could supply the respondent with current and because of the high cost of materials, labor, etc., and later receivership, it has declined and

perhaps has been unable to do so, although it entered into some kind of an engagement by which it was to supply respondent with current along this line.

When it became evident that this method of reaching complainant was not immediately feasible, complainant and respondent carried on negotiations for some other means of providing service. Finally the complainant undertook the construction at his own expense, which amounted to a little more than \$800, of a pole line properly insulated and wired to a point where the service wires supplying respondent on the poles of the railway company could be conveniently reached. This construction was made under a private contract with the respondent's superintendent of construction; the wires, pins, cross-arms and insulators were purchased by complainant of respondent under circumstances which justified the complainant in the conclusion that when his line was completed it would be satisfactory to respondent and enable him to receive the desired electric service. There was some conflict of testimony with respect to a contract or contracts which were prepared by an officer of the respondent company, one of which contracts was signed by both parties, but these do not appear to be very material to the issues involved, except as they disclose the respective attitudes of the parties hereto. When the complainant's line was completed, the respondent refused to render service except by transforming the current from 2,200 volts, as it is received from the railway company, to the required voltage at the junction point with complainant's line and there metering it, whereas the complainant demands that the current be transformed and metered in proximity to his buildings. The essential difference was shown to be that if transformed one and two-tenths miles away, the line loss at such a low voltage would be so considerable that the current delivered to complainant's buildings would be inadequate to his needs either with respect to light or small power, whereas the line loss on 2,200 volts, over the same wires, transformed near the complainant's buildings, would be so inconsiderable as not to be appreciable. The respondent objected to transforming or metering off its own lines because it claims that it might thereby be subject to damages sustained by reason of faulty or badly maintained lines over which it had no control,

but this was answered in part by complainant's offer at the time of hearing:

"The complainant agrees to maintain this line and to pay all the expenses of furnishing the current between the junction and Mr. Dean's house and to indemnify the company against any loss sustained to persons or property caused by this line; and the complainant also agrees to allow the respondent to use this line for the purpose of furnishing other consumers along the line, or accessible thereto, without any other cost than to refund to him such an amount as the revenue warrants over and above what the company would be entitled to until such time as the line is paid for and made the property of the electric company."

Under all the circumstances in this case, the Commission would unhesitatingly make an order requiring respondent to render this service, transforming the current from 2,200 volts to the required voltage in the vicinity of complainant's buildings, were it not for the legal obstacles which stand in the way. The respondent has no charter obligation to render service in West Abington Township, and so far as the evidence discloses, has never undertaken to exercise any rights to distribute electric current therein. There is, however, no legal obstacle except of its own making to its so doing.

The equities of the case, therefore, constrain the Commission to suggest for favorable consideration by respondent, that this service to complainant be undertaken with meter and transformer located on or near complainant's premises so that current at the required voltage may be delivered to his buildings. In the event of respondent's so doing, it should be indemnified against claims for damages. It is undisputed that the revenue assured to respondent from this service would be as much as it could exact from any patrons along its own service wires for similar demands.

The complaint, however, under the law controlling the case must be dismissed. An order will be entered accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on

file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, May 13, 1919, It is ordered: That the complaint in this case be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

STATE HIGHWAY DEPARTMENT *v.* ERIE & PITTSBURGH RAILROAD
COMPANY ET AL.

Crossings—Below grade—Relocation and reconstruction of.

The respondents were ordered to reconstruct and relocate the subway on State Highway Route No. 77, at a point adjacent to the south line of the Borough of Wampum, Lawrence County, for the safety of the public, said construction to be completed on or before December 31, 1919.

COMPLAINT DOCKET NO. 2730.

Order of the Commission.

Lewis Sadler, for State Highway Dept.

Wm. McElwee, Jr., for Lawrence County Commissioners.

James Stillwell, for Pgh., Youngstown & Ashtabula R. R. and Pgh. & Erie R. R.

G. L. Peck, for U. S. R. R. Administration.

BY THE COMMISSION:

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, the Commission finds and determines that the existing underpass or subway under the tracks of the Pittsburgh, Youngstown

& Ashtabula Railway Company, leased to the Pennsylvania Railroad Company, on State Highway Route No. 77, at a point adjacent to the south line of the Borough of Wampum, Lawrence County, Pennsylvania, is dangerous to the traveling public, and the relocation and reconstruction thereof is necessary for the accommodation, safety, and convenience of the public:

Now, to wit, May 26, 1919, it is ordered:

1. That the Pittsburgh, Youngstown & Ashtabula Railway Company, leased to the Pennsylvania Railroad Company, shall construct, at its own cost and expense, a new under-pass or subway at a point in State Highway Route No. 77, adjacent to the south line of the Borough of Wampum, Lawrence County, the estimated cost of which, according to layout plans prepared by the highway department, is \$30,000.

2. That said under-pass shall be constructed by said railroad company in accordance with detailed plans and specifications prepared by it and to be submitted within thirty days from date of the service of this order to the State Highway Department of the Commonwealth of Pennsylvania and the Public Service Commission of the Commonwealth of Pennsylvania for approval by both of these departments; said plans and specifications shall provide for an under-pass, which shall have a horizontal clearance of 24 feet, a vertical clearance of 14 feet, and shall be located on the alignment of the relocated highway, as now being constructed by said highway department.

3. That the cost and expense of said relocation and reconstruction, including compensation for damages, which may result to adjacent property taken, injured or destroyed, shall be borne and paid for in the following proportions:

By the State Highway Department of the Commonwealth of Pennsylvania, the sum of \$7,000

By the County of Lawrence, the sum of 3,000

By the Pittsburgh, Youngstown & Ashtabula Railway Company, leased to the Pennsylvania Railroad Company, the entire balance thereof.

4. That the portions of the cost and expense of the reconstruction and relocation of said subway, to be borne by the State Highway Department of the Commonwealth of Pennsylvania and by the County of Lawrence shall be severally paid to the Pittsburgh,

Youngstown & Ashtabula Railway Company, leased to the Pennsylvania Railroad Company, as above stated.

5. That the time of completion of the relocation and the reconstruction of said under-pass shall be on or before December 31, 1919.

6. That the structure carrying the tracks of the Pittsburgh, Youngstown & Ashtabula Railway Company, leased to the Pennsylvania Railroad Company, over State Highway Route No. 77, shall from and after its completion be maintained by said railway company.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF THE PENNSYLVANIA RAILROAD FOR ACQUISITION
OF THE PROPERTY, FRANCHISES, ETC., OF THE CUMBERLAND
VALLEY RAILROAD.

Railroads—Acquisition of property and franchises of one company by connecting company.

The Commission approved of the purchases of the property, franchises and rights of the Cumberland Valley Railroad Company by the Pennsylvania Railroad Company in accordance with an agreement made between the parties under date of January 22, 1919.

APPLICATION DOCKET No. 2471—1919.

Report and Order of the Commission.

Chas. H. Bergner, for applicant.

BY THE COMMISSION, May 26, 1919:

The Cumberland Valley Railroad Company is a corporation of the State of Pennsylvania enjoying and possessing, also, the rights and privileges of a railroad corporation within the State of Maryland. It operates a line of railroad extending from the City of Harrisburg, through Dauphin, Cumberland, and Franklin Counties, Pennsylvania, and Washington County, Maryland, to a point on the south bank of the Potomac river on the line between the

States of Maryland and West Virginia, at Powell's Bend, at which place it connects with the Cumberland Valley & Martinsburg Railroad Company, formerly a leased line of said Cumberland Valley Railroad Company, which extends from said Powell's Bend to Winchester, Virginia.

The Cumberland Valley Railroad Company has an authorized capital stock of eight million dollars (\$8,000,000) consisting of common stock of 150,302 shares, par value \$50.00, each aggregating \$7,515,100, of which said common stock there have been full paid and are outstanding 96,971 shares amounting to \$4,848,550; first preferred stock of 4,838 shares, par value \$50.00 each, aggregating \$241,900, all of which have been full paid and are outstanding; and second preferred stock of 4,860 shares, par value \$50.00 each, aggregating \$243,000, all of which have been fully paid and are outstanding. All of the stock of the said Cumberland Valley Railroad Company is now owned by the Pennsylvania Railroad Company with the exception of 66 shares of the first preferred, and 5 shares of the second preferred, and 212 shares of the common stock. The Cumberland Valley Railroad Company has no bonded indebtedness.

The legislative enactment of this State under which the Pennsylvania Railroad Company has authority to acquire the property, franchises, so forth, of the Cumberland Valley Railroad Company, is the Act of March 22, 1901, which authorizes any railroad corporation owning at least two-thirds of the whole capital stock of any other like corporation of this Commonwealth, and having a railroad connection with the railroad of the latter to acquire the franchises, property, rights and credits of the latter.

Under the agreement of sale the purchase price of the capital stock is to be \$150 per share; the stock of the vendor company now owned and held by the vendee company will be extinguished upon the filing of a copy of the agreement in the office of the Secretary of the state of each of the States of Pennsylvania and Maryland; the stock not owned by the vendee company will be paid in cash and upon payment thereof will be cancelled by the vendee company. When all the capital stock has been cancelled, the corporate existence of the Cumberland Valley Railroad Company ceases and terminates.

The balance sheet of the Cumberland Valley Railroad Company as of December 31, 1918, shows the following financial condition of said railroad company:

Road and equipment,	\$10,291,058	35
Miscellaneous physical property,	9,827	47
Investments in affiliated companies,	1,832,144	89
Other investments,	694,909	10
Current assets,	2,068,499	02
Deferred assets,	1,813,444	00
Unadjusted debits,	121,107	31
		<hr/>
Total,	\$16,831,017	14
Capital stock—		
First preferred, par value \$50.00, ..	\$241,900	00
Second preferred, par value \$50.00, ..	243,000	00
Common preferred, par value \$50, ..	4,848,550	00
Scrip preferred, par value \$50.00, .	100	00
Current liabilities,	409,168	45
Deferred liabilities,	1,638,841	50
Unadjusted credits,	1,351,069	90
Additions to property through income and surplus,	3,652,239	48
Profit and loss,	4,446,147	81
		<hr/>
Total,	\$16,831,017	14

The Pennsylvania Railroad Company will carry on their books the property acquired in an amount that will not aggregate more than the figure at which they are, at the time of acquisition, carried on the books of the Cumberland Valley Railroad Company.

The Pennsylvania Railroad Company, through stock ownership, has for many years past operated the Cumberland Valley Railroad Company as part of its transportation system and the effect of the proposed sale will be greater economy in accounting and operation. We are of the opinion and so find and determine that the sale of the franchises, property, rights and credits of the Cumberland Valley Railroad Company under the terms and conditions of the said agreement of sale is necessary and proper for the service, accommodation, and convenience of the public. An order will therefore be entered directing a Certificate of Public Convenience to be issued, evidencing the Commission's approval of said sale.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition of the Pennsylvania Railroad Company and the Cumberland Valley Railroad Company, dated the 9th day of April, 1919, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, May 26, 1919, *It is ordered*: That a Certificate of Public Convenience be issued evidencing the Commission's approval of the acquisition by the Pennsylvania Railroad Company of the corporate rights, franchises, privileges and all the railroads and other corporate property, rights and credits of the Cumberland Valley Railroad Company in accordance with the agreement entered thereto by and between said parties, under date of January 22, 1919.

By the Commission,

WM. D. B. AINEY, *Chairman*.

IN RE SWATARA CROSSINGS.*Crossings—At grade—Elimination of—Apportionment of cost.*

Five grade crossings over the tracks of the Philadelphia & Reading Railway Company in Derry Township, Dauphin County, on State Highway Route No. 139, were ordered abolished by the Commission in accordance with plans and specifications prepared by the State Highway Department.

The Commission appropriated \$75,000 of the funds at its disposal by the Act of July 25, 1917, for assisting in the elimination of grade crossings, and ordered Dauphin County to pay \$14,000, and Derry Township to pay \$1,000 to help meet the cost thereof.

COMPLAINT DOCKET NOS. 2773, 2774.

APPLICATION DOCKET NOS. 1834, 1835, AND 1836.

Lewis S. Sadler, for State Highway Dept.

W. L. Kinter, for U. S. R. R. Administration.

John T. Brady, for P. & R. Rwy. Co.

Philip S. Moyer, for Dauphin County Commissioners.

F. J. Shaffer, for Boro. of Hummelstown.

Elmer E. Erb, for Derry Twp.

Report and Order of the Commission.

RILLING, Commissioner:

The State Highway Department proposes to improve State Highway Route No. 139, formerly the Berks and Dauphin turnpike, being the old original highway between Reading and Harrisburg, terminating at the Market street bridge. In Derry Township, Dauphin County, about one-half mile east of Hummelstown, said highway at its Station No. 456, passes from the south to the north side of the Lebanon Valley branch of the Philadelphia & Reading Railway Company, at grade, and then continues eastwardly to a point at or near Station 510 thereon, about 200 feet each of Swatara station, where it again crosses at grade to the south side of said railroad. The railroad at the point of these two crossings now has, or soon will have, five tracks thereon and is used very extensively, trains passing every few minutes.

A township road known as the "Hockersville Road," leading from State Highway Route 139 at Station 506, southwardly past the Swatara station, crosses at grade the tracks of the Reading Railway Company. Another township road known as the Union Deposit road, leading from said state highway between Stations 463 and 464, at the toll house, southwardly over the tracks of the railway, at grade, to the Horseshoe pike, so-called. A highway leading from the main street in the eastern end of Hummelstown Borough extends northwardly, crossing the tracks of the railroad, at grade, and is known as "Matlack's Crossing," thence continuing in a northeasterly direction to Union Deposit.

The crossings are to be eliminated as follows:

Commencing at a point a short distance east of Hummelstown Borough at State Highway Station 430, the state highway is to be constructed in a northeasterly direction, passing under the tracks of the railroad company at State Highway Station No. 436, and thence turning east and paralleling the railroad on the north

side, continuing to and connecting with the original state highway again at or near the toll gate house and the Union Deposit road at its Station No. 463. The portion of the old highway from Station 430, extending eastwardly south of the railroad will be continued along the south side of the railroad about 300 feet to the Union Deposit highway. The portion of the Union Deposit road extending from the state highway south to the south line of the railroad right of way will be vacated.

From a point on said relocated state highway just north of the proposed western subway at Station 436, a township road is to be constructed, extending in a northerly direction to connect with the road leading from Matlack's crossing to Union Deposit, and the highway between the lines of the railroad right of way at Matlack's crossing is to be vacated.

The Hockersville road, so-called, at Swatara station, from the State Highway Route No. 169 south to the south line of the railroad right of way is to be vacated. The old state highway from the south line of the railroad right of way at Station 456 north-eastwardly across the tracks of the railroad and continuing to the relocated state highway at Station 463 thereon, is to be vacated.

This will eliminate five grade crossings. The western subway at Station 436 to have a clear width at right angles to the road of 30 feet, with a vertical clearance of not less than 14 feet, the abutments to be concrete with closed concrete slab overhead construction. The subway at Swatara station to be constructed in like manner, carrying the highway under the railroad in a straight line, to be $37\frac{1}{2}$ feet between the abutments, piers $2\frac{1}{2}$ feet in width will stand in the centre of two 15-foot driveways, and on the south side of the south driveway will be a sidewalk 5 feet in width. Two retaining walls to be constructed from the east end of this subway eastwardly along the state highway as shown on the plans.

The plans submitted by the State Highway Department for this improvement, including the detail plans for the two subways as furnished by the railroad company, are in accordance with the foregoing. The proposed use of Church street at Swatara to afford the resident of Swatara and the public approaching from the south an opportunity to reach the state highway and the north

side of the railroad at Swatara in our opinion is not the best plan that can be provided for the purpose intended, as it leaves a cul-de-sac for vehicular travel on the Hockersville road, extending from Church street northwardly to the railroad. A pedestrian subway is to be constructed at the Hockersville crossing to permit parties to reach the station, post office and other buildings on the north side of the railroad at this point. A new public highway will be laid out, commencing on said Hockersville road at a point about 150 feet south of the railroad, extending eastwardly over a vacant lot owned by James Shafer, and thence continuing eastwardly parallel to the state highway about 800 feet, and thence turning at right angles northwardly terminating in said state highway, all as shown in plans.

The following is an estimated cost of the improvement as made by the State Highway Department, save the two subways, which estimate was made by the railroad companies:

Work on state highways,	\$60,720 00
Township roads,	6,457 50
Retaining walls at Swatara station,	11,787 50
Pedestrian subway at Hockersville road, .	8,432 37
Western subway,	46,438 75
Swatara station subway,	112,109 25
Damages to railroad property, including Swatara station,	25,511 00
Estimated cost of right of way and conse- quential damages,	28,543 63
Total,	<u>\$300,000 00</u>

This work for this improvement is to be done as follows:

The Philadelphia & Reading Railway Company to construct the two subways on the state highway, including all grading within the railroad right of way, also the pedestrian subway at the Hockersville road. It shall also construct the two retaining walls along the state highway at the east end of the Swatara subway and the three township roads in compliance with the plans and specifications as approved by the Commission.

The State Highway Department to do all the work in the state highway outside of the right of way of the railroad, except the two retaining walls east of the Swatara station. Said department shall also pave the highway under the two subways.

To assist in the cost and expense of said improvement the following contributions and payments are to be made:

Public Service Commission from the fund specifically appropriated to it by the Act of July 25, 1917, P. L. No. 419 A, for the purpose of assisting in eliminating grade crossings, the sum of	\$75,000 00
Dauphin County,	14,000 00
Derry Township,	1,000 00

The work to be done by the state highway shall be paid for by it at the estimated cost of \$60,720. Should said work exceed said amount it shall be paid by the State Highway Department, and should it be less the state highway to receive the benefit of such decrease. The contribution of \$14,000 of the County of Dauphin and \$75,000 from the Commission and \$1,000 by Derry Township shall be paid to the Philadelphia & Reading Railway Company in monthly estimates as the work progresses, such estimates to be first approved by the Public Service Commission. The entire cost of all the work to be done by the Philadelphia & Reading Railway Company as herein provided, including costs of the right of way for new state highway and township highways as well as all consequential damages arising from or caused by the abolition and elimination of said five grade crossings as well as damages to the property of said railroad company, to be paid for and borne by it, whether such work, cost and damages exceed the estimated amount as herein stated, or are less, subject to the amounts to be paid to it by the Public Service Commission and the County of Dauphin and Derry Township. The two subways as well as the pedestrian subway to be hereafter maintained at the sole cost and expense of said railway company. This does not, however, include the highway under the same, which shall be maintained by the State Highway Department. The work to be commenced at once and to be fully completed on or before August 1, 1920.

The plans as herein amended be and hereby are approved, and an order in compliance with this report be issued.

ORDER.

These matters being before the Public Service Commission of the Commonwealth of Pennsylvania, originally upon the com-

plaints of the State Highway Department of the Commonwealth of Pennsylvania v. The Philadelphia & Reading Railway Company, Complaint Dockets 1772, 1773, and 1774, and the Commission having on the 8th day of January, 1918, found and determined that the existing crossings at grade at points where the tracks of the Philadelphia & Reading Railway Company cross State Highway Route 139, about 300 feet east of Swatara station, Derry Township, Dauphin County; about 500 feet west of said Swatara station, Derry Township, and about one mile east of Hummelstown, said township and county, were dangerous to the traveling public and the abolition thereof necessary for the accommodation, convenience and safety of the public, and the Commission having requested the State Highway Department to prepare plans and specifications for the elimination of the same, and further proceedings with respect to the adoption of said plans and specifications and matters incident thereto having been filed to Application Docket Numbers 1834, 1835, and 1836; and upon complaints later filed by the said State Highway Department against the Philadelphia & Reading Railway Company, to Complaint Dockets 2773 and 2774, alleging that the existing grade crossings at points where the tracks of the said Philadelphia & Reading Railway Company cross State Highway Route No. 139, at or near the eastern limits of the Borough of Hummelstown (said crossing being known as Matlack's crossing), and where the tracks of said railway company cross a public highway in Derry Township, Dauphin County, leading from State Highway Route No. 139, southwardly to the Horseshoe pike, at or near the toll house, about one-half mile east of the Borough of Hummelstown, which last mentioned crossings are hereby found to be dangerous to the traveling public and the abolition thereof necessary for the accommodation, convenience and safety of the public in addition to and in connection with the abolition of the aforementioned grade crossings (plans for the elimination of the same having been submitted by the said State Highway Department), and full investigation of the matters and things involved having been had, and the Commission having on the date hereof filed of record its report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, May 20, 1919, It is ordered:

First. That the Philadelphia & Reading Railway Company and the State Highway Department eliminates the said grade crossing and do all work in connection therewith in accordance with the terms and conditions of the report of the Commission and the plans and specifications on file with the Commission, and marked "plans for the elimination of grade crossings on State Highway Route No. 139, Sta. 436 to 510, and the detailed plans for bridges of the P. & R. Rwy. Co., spanning the highway, Derry Twp., Dauphin Co., Pa., prints 1 to 11," which said plans and specifications are hereby approved.

Second. That to assist in the bearing of the expenses of said work, the following amount shall be paid: By the Public Service Commission, from the fund specifically appropriated to it by the Act of July 25, 1917, P. L. 419 A, for the purpose of assisting and eliminating grade crossings, \$75,000, which sums the Commission hereby appropriates; by the County of Dauphin, \$14,000; by Derry Township, Dauphin County, \$1,000; to be paid and distributed according to the terms and conditions of the report of the Commission.

Third. That the Commission hereby determines that the portions of the cost and expense of the construction, relocation and abolition hereby ordered, which shall be borne by the municipal corporations and the Commonwealth, shall be severally paid as above stated.

Fourth. That all of said work be commenced at once and be fully completed on or before August 1, 1920.

By the Commission,

WM. D. B. AINEY, *Chairman.*

BOROUGH OF BEAVER *v.* BEAVER COUNTY LIGHT CO.

Rates—Contracts fixing same—Power of Commission to regulate.

It is the settled law in Pennsylvania that both complainant and respondent are entitled to have reasonable and just rates for public service at all times, and the Commission sits for the purpose of determining what rates are just and reasonable. Rates imposed by contract, like any other rates, must answer this test: if too high, they may be lowered, and if too low

the respondent may increase them. This equitable balance cannot be maintained if they are immutably bound by contracts entered into between the parties. A regulatory policy could not exist if it could not be made at all times to respond to the test of what is just and reasonable charge for utilities to receive and patrons to pay in the light of conditions from time to time presented. *Leiper v. B. & P. Railroad Company*, 262 Pa. 328, 7 P. C. R. 218.

COMPLAINT DOCKET NO. 2246—1919.

Report and Order of the Commission.

John B. McClure, for complainant.

A. W. Robertson, for respondent.

BY THE COMMISSION:

The only question submitted in this case is one fully answered by the opinion of the Supreme Court in *Leiper v. Baltimore & Philadelphia Railroad Company*, 262 Pa., 328 P. U. R. 1919 C. 397 (Advanced sheets, May 8, 1919).

By an ordinance dated June 14, 1910, the complainant and respondent entered into a contract for a definite number of years, and at prescribed rates, for electric lighting of the borough streets and for the service of citizens resident therein.

Notwithstanding the contract, the respondent has filed a tariff increasing these rates, against which the complainant has filed this complaint.

By agreement of counsel at time of hearing, and by later stipulation in writing filed with the Commission, no other question is before us except the right of the respondent to file a rate schedule in conflict with the ordinance terms.

By the decision above referred to, it appears to be the settled law of Pennsylvania that both complainant and respondent are entitled to have reasonable and just rates for public service at all times, and the Commission sits for the purpose of determining what rates are just and reasonable. Rates imposed by contract, like any other rates, must answer this test: if too high they may be lowered, and if too low the respondent may increase them. This equitable balance can not be maintained if they are immutably bound by contracts entered into between the parties. A regulatory policy could not exist if it could not be made at all

times to respond to the test of what is a just and reasonable charge for utilities to receive and patrons to pay in the light of conditions from time to time presented. Presently when prices of labor and materials are moving upward, the tendency is toward rate increases, but when and if prices shall return to the former level, the trend will be in the other direction.

As the complainant does not attack the reasonableness of the filed rates, but relies wholly upon the validity of the municipal contract, a matter disposed of by the Leiper case opinion, *supra*, the complaint must be dismissed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, May 13, 1919, It is ordered: That the complaint in this case be and the same hereby is dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

IN RE ABOLITION OF CROSSINGS NEAR LEHIGH GAP, NORTHAMPTON COUNTY, OF STATE HIGHWAY ROUTE NO. 163.

Crossings—At grade and above grade—Abolition of—Assessment of costs.

Two grade crossings over the tracks of the Central Railroad Company of New Jersey in Northampton and Carbon Counties, on State Highway Route No. 163, were ordered abolished by the Commission in accordance with plans and specifications prepared by the State Highway Department.

The Commission appropriated \$25,000 to assist in defraying the cost of the undertaking and assessed the costs upon the parties benefitted.

APPLICATION DOCKET No. 2446—1919.

Report and Order of the Commission.

H. B. Thomas, for U. S. Railroad Administration.

J. C. Loose, for Central Railroad of New Jersey.

E. H. Shipman, for Lehigh Coal & Navigation Co., and Lehigh & New England Railroad Co.

A. B. Schultz, for Chestnut Ridge Railway Co.

W. D. Thomas, County Solicitor, for Carbon County.

T. McKean Chidsey, County Solicitor, for Northampton County.

RILLING, Commissioner:

State Highway Route No. 163 parallels the Lehigh river through Lehigh Gap. At its Station 945 in Lehigh Township, Northampton County, it passes from the east to the west side of the double tracks of the Central Railroad Company of New Jersey by a narrow underpass, which has heretofore been declared unsafe by this Commission, and which, in times of high water, becomes flooded. After passing through this subway it continues northwardly on low ground between the tracks of the Central Railroad and the Lehigh river, a distance of about 2,400 feet, when it again crosses at grade the tracks of said railroad company at or near its Station 969 to the east side thereof, and thence continues northward to Mauch Chunk. The county line between Northampton and Carbon Counties crosses this highway near its Stations 951 and 952, about 600 feet north of the subway above mentioned. Chestnut Ridge Railway Company, now owned by the New Jersey Zinc Company, has a single-track line connected with the east track of the Central Railroad at a point about opposite Station 964 of the state highway, from which point it proceeds northwardly a short distance along the east side of the tracks of the Central Railroad Company, and thence bearing to the right, continues on to Cunklestown. This single track is used to a very limited extent. The tracks of the Central Railroad Com-

pany are used to a very large extent and the grade crossing above mentioned is very dangerous.

Pursuant to the order of the Commission, the State Highway Department has filed with the Commission plans to eliminate both the dangerous subway and grade crossing by continuing the highway on the east side of the Central Railroad tracks. As the tracks of the railroad, however, at this point are laid against a rock cut on the east side, it becomes necessary to shift the tracks to the west toward the river a sufficient distance to permit the highway to be constructed between said tracks and the rock cut. This plan will eliminate both the subway and the dangerous grade crossing, but contemplates the crossing at grade the new highway by the single track of the Chestnut Ridge Railway Company which, however, is to be relocated and connected with the Central Railroad at a point several hundred feet to the north. In order to make the necessary improvements the tracks of the railroad company must be shifted toward the river. The construction of the highway on the east side of the railway also requires additional right of way. The construction of the highway in the new location will be high and dry while at its present location, between the tracks and the river, on low ground, it is frequently flooded.

The Chestnut Ridge Railway has submitted a plan changing the point of connection of its line with the Central Railroad from that shown on the plan made by the State Highway Department. The proposed change is agreeable to the State Highway Department. It is intended, however, if the track of the Chestnut Ridge Railway Company is constructed in accordance with this plan, that a "D" rail shall be provided at or near the east line of the state highway, and that a member of the train crew shall precede each train movement crossing said highway. The Central Railroad Company made some suggestions as to the changing of the plans whereby it was afforded additional right of way. After conference between the engineers of the railroad and the State Highway Department the objections on the part of the railroad company were met and new plans indicating the change have been made and filed with the Commission. These plans as now corrected are satisfactory to both the railroad companies, the State Highway Department, and the county commissioners of Carbon and

Northampton Counties, and to Lehigh Township, in Northampton County, and are hereby approved.

The Lehigh & New England Railroad Company crosses the Lehigh river and the tracks of the Central Railroad Company and State Highway Route 169 at a point on said highway between Stations 950 and 951. The tracks of said company, however, are constructed on a trestle about 100 feet above the water level of the river and are not interfered with in the proposed improvement. The towpath of the Lehigh Coal & Navigation Company extends along the east bank of the Lehigh river at this point and in the relocation of the tracks of the Central Railroad some slight changes must be made in the construction of said towpath.

The Central Railroad Company filed with the Commission an itemized statement of the approximate cost of relocating its tracks in accordance with the plans as agreed upon, amounting to \$54,897.15. This includes the cost of additional right of way as is required and consequential damages as well as the cost of making the changes in the towpath of the Lehigh Coal & Navigation Company and contemplates occupying a portion of the abandoned state highway as now used, without allowing any compensation therefor. The right of way abandoned by it at the point of this improvement and occupied by the relocated state highway is to be granted for highway purposes without consideration. The railroad company has agreed to undertake to do all work necessary to relocate its tracks, subject to the conditions herein mentioned.

The State Highway Department filed with the Commission an itemized estimate of the cost of reconstructing the newly located highway, amounting to \$49,312.06, also an estimate of the expenses necessary to reconstruct the track of the Chestnut Ridge Company in accordance with the plans filed by it, amounting to \$4,670.75, making a total estimated cost of the entire improvement of \$108,879.96. The representatives of the United States Railroad Administration were present and approved the plans and the work, and represented to the sitting commissioner that they would endeavor to obtain the consent of the government that the necessary funds would be made available that the work, so far as the Central Railroad Company is concerned, might be carried to com-

pletion the present summer, and the corporation itself is in accord with the plan to carry out this improvement.

The Chestnut Ridge Railway Company has consented to do all the work necessary to relocate its line in compliance with the plan submitted by it and the conditions set forth in this report, subject to the provisions relating to the payment of the cost thereof hereinafter contained.

The total estimated cost of the improvement is, therefore, as follows:

Relocating Central Railroad tracks,	\$54,897 15
Reconstructing state highway,	49,312 06
Reconstructing Chestnut Ridge Railway Company,	4,670 75
Total,	<u>\$108,879 96</u>

All the work necessary to relocate the tracks of the Central Railroad Company of New Jersey in compliance with the plan as now made shall be done by said company. All the work necessary to reconstruct the track of the Chestnut Ridge Railway Company in compliance with the plan now made shall be done by that company, and all the work necessary to reconstruct the state highway shall be done by the State Highway Department, all at their own cost and expense, each of said parties to bear the cost of any additional rights of way and all consequential damages, whether the same are included in the foregoing estimates or not.

To assist in the bearing of expenses of said work by the three parties as hereinbefore stated, the following amounts shall be paid:

By the Public Service Commission,	
from the fund specifically appropriated to it by the Act of July 25, 1917, P. L. No. 419 A, for the purpose of assisting in eliminating grade crossings,	\$25,000
By the County of Northampton,	4,000
By the County of Carbon,	4,000
By the Township of Lehigh,	300
By the Township of Lower Towamensing,	100
Total assessments,	<u>\$33,400</u>

One-half of said contribution, amounting to \$16,700, is to be paid by the parties contributing the same to the Central Railroad Company of New Jersey, and the remaining one-half is to be paid by the parties contributing the same to the State Highway Department and the Chestnut Ridge Railway Company, pro rata, according to the respective estimates made of the cost of work to be done by them, in compliance with this report. All of said work to be fully completed on or before September 1, 1919. Payments to be made out of the contributions hereinbefore stated monthly, upon estimates made by the parties as the work progresses, such estimates to be first approved by the Public Service Commission.

If the Chestnut Ridge Railway Company should elect not to reconstruct its tracks and connect the same with the tracks of the Central Railroad Company of New Jersey, removing said tracks in so far as they may be within the limits of said proposed highway, then the said Chestnut Ridge Railway Company shall be relieved from all cost or expense in connection with the improvement, and the entire one-half of the contributions herein provided to be paid to it and the State Highway Department shall be paid to the State Highway Department and such action shall not prejudice the right of said company in the future to make an application to the Commission for a reinstatement of a connection with the tracks of the Central Railroad Company of New Jersey, in right to cross said state highway.

An order will be issued in compliance with this report.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania, originally upon the complaint of W. M. Benninger et al. v. The Central Railroad Company of New Jersey, Complaint Docket 1654—1917, and the Commission having on the 9th day of September, 1918, found and determined that the underpass carrying State Highway Route No. 163 under the tracks of the Central Railroad Company of New Jersey, in Lehigh Township, Northampton County, and the grade crossing on said highway route over the tracks of said railroad company in Lower Towamensing Township, Carbon County, were danger-

ous to the traveling public, and the abolition thereof necessary for the accommodation, convenience and safety of the public, and the Commission having requested the State Highway Department to prepare plans and specifications for the elimination of the same, and further proceedings with respect to the adoption of said plans and specifications, and matters incident thereto having been filed to Application Docket No. 2446—1919, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof filed of record its report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to wit, May 20, 1919, It is ordered:

First. That the Central Railroad Company of New Jersey in conjunction with the State Highway Department, eliminate the underpass where State Highway Route No. 163 passes from the east to the west side of the double tracks of the said Central Railroad Company of New Jersey at State Highway Station No. 945, in Lehigh Township, Northampton County, and also the grade crossing where said State Highway Route No. 163 crosses from the west to east side of said tracks, at or near State Highway Station No. 969, in Lower Townshensing Township, Carbon County, in accordance with the plans and specifications on file with the Commission and marked "Plans for elimination of grade crossing and undergrade crossing on State Highway Route No. 163, Station No. 942 to 971, in Northampton and Carbon Counties, Pennsylvania, Prints I to V," which said plans and specifications are hereby approved, and in accordance with the terms and conditions of the report of the Commission.

Second. That the Chestnut Ridge Railway Company shall at its own cost and expense, estimated at \$4,670.75, reconnect its tracks with the tracks of the Central Railroad Company of New Jersey at the point shown in conformance with the plans heretofore mentioned, and the terms and conditions of the Commission's report, including all grading necessary, and install a "D" rail at or near the east line of the state highway, as shown on said plans.

Third. That the Central Railroad Company of New Jersey perform all the work necessary to relocate its tracks in compliance with the plans, at its cost and ex-

pense, estimated at \$54,897.15, including any cost for additional rights of way and all consequential damages caused by the said relocation of its tracks, provided however, that the railroad company may use free of cost so much of the abandoned state highway as it shall deem necessary in order to relocate the same.

Fourth. That the State Highway Department shall perform all the work necessary to reconstruct the portion of said Highway Route No. 163 in compliance with the plans at its own cost and expense, estimated at \$49,312.06, including any cost for additional rights of way and all consequential damages caused by said construction, provided however, that the said State Highway Department may use free of cost so much of the abandoned right of way caused by the relocation of the tracks of the Central Railroad Company as it may deem necessary in order to reconstruct said highway.

Fifth. That to assist in the bearing of the expenses of said work the following amounts shall be paid:

By the Public Service Commission, from the fund specifically appropriated to it by the Act of July 25, 1917, P. L. 419 A, for the purpose of assisting in eliminating grade crossings,	\$25,000
which sum the Commission hereby appropriates.	
By the County of Carbon,	4,000
By the County of Northampton,	4,000
By the Township of Lehigh, Northampton County,	300
By the Township of Lower Towamensing, Carbon County,	100

to be distributed as follows:

Sixteen thousand, seven hundred dollars, or one-half of same, to the Central Railroad Company of New Jersey; \$15,255.068 to the State Highway Department, and \$1,444.932 to the Chestnut Ridge Railway Company, be a portion pro rata according to the estimated cost to them of said elimination, namely:

State Highway Department,	\$49,312 06
Chestnut Ridge Railway Company,	4,670 75

to be paid according to the terms and conditions of the report of the Commission.

Sixth. That the Commission hereby determines that the portions of the cost and expense of the construction, relocation and abolition hereby ordered which shall be borne by the municipal corporations and the Commonwealth shall be severally paid as above stated.

Seventh. That in case the Chestnut Ridge Railway Company should determine not to connect its tracks with the tracks of the Central Railroad of New Jersey, but terminate same at a point east of the highway, it shall remove its tracks over the relocated highway at its own cost and expense and without prejudice to the right of said company in the future to make an application to the Commission for a reinstatement of a connection with the tracks of the Central Railroad Company and the incidental right to cross said state highway, and shall not be at any further expense and any sum hereinbefore ordered to be paid to it shall be paid to the State Highway Department.

Eighth. That in the event the Chestnut Ridge Railway tracks of the Central Railroad of New Jersey in the manner designated in said plans, all movements of trains over the relocated state highway shall be preceded by a flagman.

Ninth. The Chestnut Ridge Railway Company shall, on or before July 1, 1919, notify the Commission in writing if connection of its tracks with the tracks of the Central Railroad Company of New Jersey will be made, in accordance with the terms and conditions of Section 2 of this order.

Tenth. That all of said work be completed on or before September 1, 1919.

By the Commission,

WM. D. B. AINEY, *Chairman.*

SUPERIOR COURT.

HARMONY ELECTRIC COMPANY, APPELLANT, *v.* THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, APPLLEE, AND PENNSYLVANIA POWER COMPANY, INTERVENING APPELLEE.

Contract for municipal lighting—Not approved by Public Service Commission—Not effective without such approval—Must be necessary for accommodation, convenience or safety of the public.

When the Commission in the exercise of the discretion vested in it by law has not found that the approval of a contract for municipal lighting is necessary for the accommodation, convenience or safety of the public, and has refused to approve the same, the court will not substitute its opinion for that of the Commission. Approval is properly refused when the appellant has no exclusive right to furnish electric current under the law of its creation and has no vested right to do so.

In the Superior Court of Pennsylvania. No. 33 March Term, 1918. Appeal from the order of the Public Service Commission, certified from the Court of Common Pleas of Dauphin County, at 76 Commonwealth Docket, 1914, being an appeal from the order of the Commission entered in re contract between Harmony Electric Company and the Borough of Ellwood City, Municipal Contract Docket No. 60, 1914. Affirmed.

J. Norman Martin and *Walter Lyon*, for appellant.

Berne H. Evans, for appellee.

Ralph J. Baker and *Geo. E. Alter*, for intervening appellee.

PORTER, J., April 21, 1919:

This is an appeal from a determination of the Public Service Commission refusing to approve a proposed contract between the appellant company and the Borough of Ellwood City, in the County of Lawrence. The order of the Commission was dated July 9, 1914; the appeal from that determination was originally taken to the Court of Common Pleas of Dauphin County, on August 5, 1914, and the record maintained in that court until July

11, 1917, when it was certified to this court. The parties not deeming the matter urgent, the argument of the appeal was delayed to suit the convenience of counsel. Several questions are discussed in the printed briefs and were referred to at length upon the oral arguments which it is not within our province to consider, as they were not raised at the hearing before the Public Service Commission, and no testimony was offered establishing facts out of which those questions could arise. The Public Service Company Law, the Act of July 26, 1913, P. L. 1374, Article VI, Section 22, provides: "At the hearing of the appeal the said court shall, upon the record certified to it by the Commission, determine whether or not the order appealed from is reasonable and in conformity with law," and to this record our inquiry must be confined. The Pennsylvania Power Company, the protestant before the Commission, and the intervening defendant here, had been furnishing electric light to the Borough of Ellwood City under a five-year contract which expired on January 7, 1914. The charter of the company was not offered in evidence and is not before us, but it was assumed by the parties at the hearing that the company had the lawful right to so furnish electricity and that it and the appellant company had the lawful right to compete for this business. We must, therefore, dispose of the case in the same manner in which it was presented to the Commission.

The plant of the Pennsylvania Power Company is located in the Borough of Ellwood City. The Commission found that it represented an investment of \$350,000.00. There was evidence sufficient to sustain that finding and the learned counsel for the appellant company conceded in his statement before the Commission that it was probably worth \$100,000.00. The capital of the Harmony Electric Company, the appellant, is \$25,000.00, and the only property which it possessed was a lease of a plant for the generation of electricity, located about nine miles from the borough; the annual rental which it covenanted to pay for this plant was \$18,000.00. The contract with the Borough of Ellwood City which the Public Service Commission was asked to approve was to run for a term of ten years, and it contained no provision requiring the electric company to give security for its faithful performance. The borough authorities had, in September, 1913, requested the Pennsylvania Power Company and the Ellwood City

Electric Company (which corporation subsequently became merged in the Harmony Electric Company) to make bids "for furnishing the borough with electric current, for a five-year contract, and a ten-year contract." There was no advertisement for bids; there is no statutory requirement that there should be nor were the borough authorities required to resort to competitive bidding in the matter. The invitations to each of the two companies stated that bids would be received not later than September 30, 1913, but there was nothing in the correspondence which could be held to require the borough to accept any bid. The municipality remained perfectly free to accept new bids from either of the companies or from any other bidder who might be able to furnish the electric current. When the bids were opened it was found that the Ellwood City Electric Company had offered to furnish electric current during the period of ten years at the flat rate of 1.5 cents per kilowat hour, while the bid of the Pennsylvania Power Company was to furnish current upon a sliding scale of rates, dependent upon the amount of current furnished. The committee on electric light of the borough council reported, on October 7, 1913, that the bid of the Ellwood City Electric Company was the lower, and recommended that a contract be awarded to that company. The Pennsylvania Power Company upon the same day, October 7, 1913, addressed a communication to the borough council stating that their bid had been misunderstood, that it was in fact more favorable to the borough than that which the committee of the council had reported in favor of accepting, and that in view of this misunderstanding the company would agree to furnish electric current at the rate of 1.5 cents per kilowat hour for a five-year contract with the privilege to the borough of renewing the contract at that rate for an additional five years. This communication further stated that the Pennsylvania Power Company still considered their original bid as more advantageous to the borough, and that the company would still stand bound by that bid in case the borough upon consideration chose to accept it. It is here proper to observe that the borough down to this time had assumed no contract obligation. It then had presented to it the offer of the Ellwood City Electric Company to furnish current at the price of 1.5 cents per kilowat hour during a period of ten years and a proposition of the Pennsylvania Power Com-

pany to furnish current at the same rate for a period of five years, the borough to have the right to continue the contract for an additional five years, in case at the expiration of the first period the borough authorities elected so to do. The Pennsylvania Power Company, on December 3, 1913, addressed a communication to the borough council that although the existing contract between that company and the borough would expire on January 7, 1914, the company would not suspend its service at that date unless ordered to do so by the borough officials, and that it would continue to furnish electric service to the borough at the rate of 1.5 cents per kilowat hour, such service to be discontinued upon receipt of written notice from the borough council. Thus the matter rested until December 31, 1913, when the burgess approved an ordinance of the borough council awarding the contract to the Ellwood City Electric Company during the term of ten years, subject to the approval of the contract by the Public Service Commission. Neither the borough nor the electric company was to become bound by the contract until approved by the Public Service Commission.

The appellant company came into existence upon the 31st day of December, 1913, by the merger of the Ellwood City Electric Company and a number of other corporations, and became invested with the rights of the companies thus merged. Both the appellant company and the Pennsylvania Power Company had the right to furnish this borough with electricity, subject to the approval of the Public Service Commission, but neither of the companies had the exclusive right to contract with the borough for furnishing current. When a contract is presented to the Public Service Commission for its approval, the authority and duty of the Commission is defined by Article V, Section 18, of the Public Service Company Law: "Such approval, in each and every such case, or kind of application, shall be given only if and when the said Commission shall find or determine that the granting or approval of such application is necessary or proper for the service, accommodation, convenience or safety of the public." This appellant having no exclusive right to furnish electric current under the law of its creation and having no vested contract right so to do, and there being a company already in existence which had the right to furnish the current and had for years done so to the

satisfaction of all parties concerned, the question whether the approval of the contract was necessary or proper for the service, accommodation, convenience or safety of the public, was certainly not a question of law. The question was really one which involved the public welfare. It was proper for the Commission to consider all the facts which tended to throw light upon the interests of the community to be served, including the character and location of the plants and instrumentalities of the respective companies and the probabilities of their being able to continue to furnish satisfactory service during a long period of years. The council of the borough which, in the closing days of its existence, awarded this contract, underwent a change early in January, 1914, new members having been elected in the November preceding. A majority of this new council adopted a resolution praying the Public Service Commission to refuse its approval of the contract, and a large number of business men in the borough joined in a petition praying for similar action. The Public Service Commission in passing upon the question thus presented to it was exercising administrative functions. We have repeatedly said that this court is not a second administrative body and we have no authority to substitute our judgment for that of the Commission in the decision of such questions. We would not be warranted in reversing the determination of the Commission save in a case which involved a manifest and flagrant abuse of discretion. In view of the evidence as to the judgment of parties directly interested and the final declaration of a majority of the members of the council of the borough, we certainly cannot say that the determination of the Commission was not reasonable.

The determination of the Public Service Commission is affirmed and the appeal dismissed at costs of the appellant.

SUPREME COURT OPINIONS.

PERRY COUNTY TELEPHONE AND TELEGRAPH COMPANY, APPELLANT, *v.* THE PUBLIC SERVICE COMMISSION, APPELLEE.

Telephone companies—Extensions—New routes—Duplication of lines of another company—Approval withheld by Commission—Jurisdiction of Commission—Monopolies.

The refusal of the Public Service Commission to approve of the construction of certain new routes by a telephone company is not in violation of any constitutional provision of the State of Pennsylvania. The Commission is vested with certain discretionary powers and the refusal by it to approve the construction of new routes which would duplicate those already in existence is a reasonable exercise of such discretion.

In the Supreme Court of Pennsylvania, No. 276, January Term, 1919. Appeal from the decision of the Superior Court at No. 10, March Term, 1918, affirming the order of the Public Service Commission in re: Application of Perry County Telephone and Telegraph Company for extension of lines, A. D. No. 219, 1915. Affirmed.

Wm. H. Sponsler, for appellant.

John Fox Weiss and *Berne H. Evans*, for appellee.

FRAZER, J., June 21, 1919:

The Perry County Telephone & Telegraph Company was incorporated under the general Corporation Act of April 29, 1874, P. L. 73, with authority to locate its lines over certain designated routes in Perry County. In 1915, desiring to extend its lines, application was made for amendment to its charter, specifying a number of additional routes and connections. The application was approved by the secretary of the commonwealth, whereupon the Public Service Commission was petitioned for its consent and for a certificate of public convenience, as required by section 18 of the Public Service Company Act of July 26, 1913, P. L. 1374. Objection to several routes named in the amended charter was made by the Cumberland Valley Telephone Company, alleging the latter company was at the time adequately serving the public in the particular localities named, and that the establishing of a competing line would retard, rather than promote, the convenience of the public, and impose the additional burdens of duplication of systems. After hearing before the Commission, a certificate

was refused with leave, however, to petitioner to amend by striking out two described routes the Commission found would result in a duplication of system, without means of communication between them. On appeal to the Superior Court the order of the Public Service Commission was affirmed, whereupon an appeal was allowed to this court to consider the constitutional question raised, whether the Public Service Commission has authority, in effect, to create a monopoly by refusing to permit the establishing of competing lines in designated territory.

Appellant contends the conclusion reached by the Public Service Commission and the Superior Court is inconsistent with the general policy indicated in Article XVI, Section 12, and Article XVII, Section 4 of the Constitution, prohibiting the consolidation of telegraph, railroad and canal companies, thus indicating an intent to maintain open and free competition in rates and facilities. The latter article relates to "railroads and canals" only and section 4 provides, in substance, that no railroad, canal or other corporation shall consolidate with or in any way control a parallel or competing line and must, therefore, be limited in its application to railroad companies. This section has been construed not to include street railroad companies: *Gyger v. Philadelphia City Passenger Ry. Co.*, 136 Pa. 96. While the section is relied upon by appellant merely for the purpose of indicating a general policy established for the control of means of public transportation or communication, the two facilities are so entirely distinct that little help can be derived from a further reference to this provision, especially when we find in another section of the Constitution express provision governing telegraph companies.

Article XVI of the Constitution relates in general to private corporations and provides, in section 12, that "any association or corporation organized for the purpose, or any individual, shall have the right to construct and maintain lines of telegraph within this state, and to connect the same with other lines and the general assembly shall, by general law of uniform operation, provide reasonable regulations to give full effect to this section. No telegraph company shall consolidate with, or hold a controlling interest in the stock or bonds of any other telegraph company owning a competing line, or acquire, by purchase or otherwise, any other competing line of telegraph." Appellee seems to concede that a tele-

phone company is a telegraph company within the meaning of this section: *Peoples' Telephone & Telegraph Co. v. Berks & Dauphin Turnpike Rd.*, 199 Pa. 411; *Bell Tel. Co. v. Commonwealth*, 2 Sadler 299; *Cochran Tel. Co. v. Petroleum Telephone Company et al.*, 263 Pa. 506. The right given to a corporation or individual to construct and maintain lines and connect the same with other lines is thus made expressly subject to such reasonable regulations as the legislature may provide, consequently, it cannot be successfully argued that the right to construct a line is absolute, regardless of conditions or circumstances in the locality to be served. The constitutional provision in question also gives an association or individual the right to connect their lines with other lines, and notwithstanding this privilege, plaintiff has successfully resisted an attempt on behalf of the Cumberland Valley Telephone Company to make such connection with its line. An argument or theory used by plaintiff in support of its contention in the proceedings referred to would be equally applicable here against the position it now assumes. Grants and franchises, especially those quasi-public in their nature, are to be strictly construed in favor of the commonwealth and against the grantee, inasmuch as they are in derogation of the common law rights of individuals. In *Penna. R. R. Co. v. Canal Commissioners*, 21 Pa. 9, page 22, this court said: "But corporate powers can never be created by implication nor extended by construction. No privilege is granted unless it be expressed in plain and unequivocal words, testifying the intention of the legislature in a manner too plain to be misunderstood. When the state means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the powers which belong to her, it is so easy to say so that we will never believe it to be meant when it is not said." And in *American Transfer Co.'s Petition*, 237 Pa. 241, it was said in an opinion of the lower court, affirmed by this court (page 245), "'Grants of franchises are usually prepared by those interested in them and submitted to the legislatures with a view to obtain the most liberal grant obtainable, and for this and other reasons such grants should be in plain language, certain, definite in nature, and contain no ambiguity in their terms, and will be strictly construed against the grantee, *Cleveland Electric Ry. Co. v. Cleveland*, 204 U. S. 116; *Blair v. Chicago*, 201

U. S. 400. 'It is a general rule that "every public grant of property or of privileges or franchises, if ambiguous, is to be construed against the grantee in favor of the public:"' 1 Cook on Corporations (6th edition, section 2); Knoxville Water Co. v. Knoxville, 200 U. S. 22."

While the language quoted was applied in cases where the question was one of construction of corporate franchises under statutory provision the general principles governing the construction of statutes, however, apply also to the interpretation of constitutions: 12 Corpus Juris 699; Booth & Flinn, Ltd., v. Miller, 237 Pa. 297, 306.

The provision in question, it will be observed, while not self-executing is subject to "reasonable regulations" to be fixed by the legislature. Although it would be the duty of this court to declare invalid a regulation clearly unreasonable as violating rights expressly granted, the express power, however, thus given the legislature to impose conditions upon the granting and use of a public franchise will not be interfered with merely because of an unexpressed general policy or spirit supposed to underlie and pervade the constitution. Although in a sense refusal to permit the construction of a competing line may be conceded as creating a monopoly and thus defeating the purpose, the framers of the constitution evidently had in mind in prohibiting the consolidation of competing telegraph lines and railroads, nevertheless, before reaching a conclusion on this question, consideration of other matters directly affecting the decision becomes important, to wit, the burden necessarily following from the maintenance by the public of dual systems to provide facilities which, in their very nature are monopolies, and also the existence of legislation conferring upon a public body the power to inquire into and regulate rates alleged to be excessive, thus removing danger of evils experience has taught generally result from a monopoly in the supply of a particular commodity to the public. Competition may be, and is very desirable in many lines of business; there are, however, a number of quasi-public enterprises which may be classified as natural monopolies in case the duplication of facilities merely results in the placing of an additional burden upon the public by forcing persons to maintain two systems where one would serve the purpose as effectually and at less cost. In this

class may be placed the furnishing of gas, water, electricity and telephone service to the public. The argument that competition between rival facilities serves to reduce the price to the consumer is not sustained logically. The duplication of water systems, for instance, means the expenditure of a large amount of money in the construction of reservoirs, laying of pipes, etc., in turn involving duplication of inconvenience to the public in tearing up streets and making excavations without proportionate benefit. The duplication of telephone systems in a given locality without connection between their lines requires subscribers to install both systems and pay double service to reach subscribers on but one of the two systems. Or, as frequently happens, subscribers maintain both systems when they can reach other users with equal facility on either system. It is useless to argue that the cost of construction of such duplicate systems is paid by investors, and the risk of financial failure is theirs, owing to the burden of finally paying the carrying charges, and income to the investors is imposed upon the public with the result that a higher charge on the part of each competing company becomes necessary, due to the division of the patronage of the public. This is especially true in the smaller cities and country districts where the public to be served is limited in numbers. To hold, therefore, that public policy, as indicated by the section of the constitution in question, was intended to permit the construction of competing lines under any and all conditions without inquiry into the character of the territory to be served and the existence in the locality of facilities adequate to accommodate the public, would amount to a destruction of the very object the policy is designed to establish.

In passing the Public Service Company Law of 1913, the legislature apparently had in mind the fact that with respect to certain public service facilities the construction of competing lines must, at times, tend to impose additional burdens on the public without proportionate benefits and, accordingly, placed on telephone companies the duty of transmitting messages without unreasonable interruption or delay and also the further duty of making connection with the lines of other companies for the interchange of conversation at such times and places as this could be conveniently done, without injury to the other company, and when necessity existed for such union. Article V, section 9, of

the act contains a similar provision investing the Public Service Commission with power to require connection of system and facilities. By another section the Commission is authorized to inquire into and regulate rates charged by Public Service Companies. We thus have express legislative provisions for preventing undue burdens being imposed upon the public in the way of excessive rates by companies having no competition in districts supplied by them; consequently, we cannot say a refusal by the Public Service Commission to approve an application for the construction of a competing telephone system in a district already served at rates the Commission has full power to control, and when practically the sole result of such additional system would be the duplication of maintenance charges the public must ultimately bear is an "unreasonable regulation" within the meaning of the constitution. No policy of the constitution is violated by the statute, and, furthermore, the basis of the action of the Commission is the interest of the public as distinguished from the interest of the corporation or individual making the application.

The judgment of the Superior Court is affirmed, and the appeal is dismissed at the cost of the appellant.

SUPERIOR COURT.

THE WILKES-BARRE COMPANY, APPELLANT, *v.* THE PUBLIC SERVICE COMMISSION, APPELLEE, AND THE WILKES-BARRE LIGHT COMPANY, INTERVENING APPELLEE.

Appeals—Time for taking same—Light companies—Contract ordinance with municipality—Not binding until accepted by company—Acceptance may be subsequent to approval of Commission—Scope of appellate review.

A public service company which has protested against the granting of a certificate of public convenience by the Commission approving a contract between another public service company and a city but which has not availed itself of the right to intervene under Section 14 of Article VI of the Public Service Company Law, is not entitled to notice of the "determination" of the Commission, and its right to appeal, if at all, is limited to thirty days under section 17 of the act.

It is not necessary that a binding contract between a municipality and a public service company be entered into before the approval of the Public Service Commission is sought, but the approval, when granted, does not dispense with the necessity of accepting the terms of the ordinance by the company before it acquires any right to use the streets of the municipality.

Where there is a question under the evidence as to whether or not the determination of the Commission was reasonable, but it cannot be said that it was without evidence to support it, the court will not substitute its own judgment for that of the Commission on a purely administrative question.

In the Superior Court of Pennsylvania. No. 17, March Term, 1918. Appeal by plaintiff from order of the Public Service Commission, No. 234, M. C. Docket, 1915, awarding certificate of public convenience to the Wilkes-Barre Light Co. Affirmed.

Douglass D. Storey, W. C. Price and Ralph J. Baker, for appellant.

Berne H. Evans, for appellee.

William N. Trinkle and Wm. I. Hibbs, of counsel, for intervening appellee.

PORTER, J., October 31, 1918:

The Wilkes-Barre Light Company, the intervenor, presented its petition to the Public Service Commission, praying for a certificate of public convenience, evidencing the approval of the Commission of a certain ordinance contract ordained by the City of Wilkes-Barre, prescribing the conditions upon which the city would consent to the entry upon its streets by the corporation, for the purpose of supplying light, heat and power. The Wilkes-Barre Company, a corporation already having the right, under its charter, to supply light, heat and power within the municipality, protested against the approval of the contract ordinance by the Commission. The proceedings before the Commission were protracted, much testimony was taken and after the parties were fully heard, the Commission approved of the ordinance and granted a certificate of public convenience. The Wilkes-Barre company appeals from the action of the Commission.

The determination of the Commission appealed from in this case was filed and the order that the certificate of public convenience issue was made on May 22, 1917. The appeal of the Wilkes-

Barre company to this court was taken on June 28, 1917. The Public Service Company Law, Act of July 26, 1913, Article VI, Section 17, P. L. 1424, relating to appeals from the Public Service Commission, provides: "Within thirty days after the filing of any finding or determination by the Commission, or after the date of service of any order * * * any party to the proceedings affected thereby may appeal therefrom." It was manifestly the legislative intention to make a distinction between those cases in which the action of the Commission involved only the approval of something in which the general public had an interest, but did not directly affect the rights or property and did not require any individual or corporation to perform any service, such a case as that with which we are now dealing, on the one hand; and those in which the Commission issued an order, requiring some individual or corporation to do or abstain from doing some act, or to perform the act in a certain way, and in which notice to the party affected was a reasonable requirement. This appellant had not availed itself of its right to intervene and become a party to the proceeding, in the manner provided by section 14 of Article VI, of the Public Service Company Law, and was not entitled to notice of the "determination" of the Commission; as to it, if it was entitled to appeal, the time began to run from the filing of the determination. We might, therefore, quash the appeal upon this ground. This being the first case, however, in which this question has been raised, we deem it well to consider the question argued by counsel and so ably discussed in their respective briefs, in so far as they go into the merits of this litigation.

The principal question upon which the parties are at variance is: "Was there any valid contract or franchise agreement made and presented to the Commission by a party competent to do so? This is the second question presented by the appellant in its statement of the question involved. Mature consideration of the provisions of the ordinance of the City of Wilkes-Barre and the facts presented to the Commission has led us to the conclusion that the existence of a contract, absolutely binding upon the city and upon the company, was not necessary to the exercise of jurisdiction by the Commission in this case. The Wilkes-Barre Light Company was incorporated under the provisions of the Act of May 8, 1889, P. L. 136, and its right to enter upon the

streets of the city was subject to the limitation contained in that statute, viz: "No company shall enter upon any street in any city * * * until after the consent to such entry of the councils * * * shall have been obtained." The city had the right to determine the conditions upon which it would consent. The ordinance here involved contained provisions not only regulating the manner in which the appliances of the light company should be installed upon the streets, but required the company to enter into a contract to furnish certain service to the city gratuitously, to bid upon furnishing street lights to the city at not exceeding certain rates, to furnish light to the residences of citizens at not exceeding certain rates and to do other things not necessary here to specify. The tenth section of the ordinance provided, inter alia, that if the company failed "to accept the provisions of this ordinance. * * * within ninety days from the passage of this ordinance, * * * then in all such case all property, including the plant and equipment, rights and franchises whatsoever of the said company shall become the absolute property of the City of Wilkes-Barre." The fourteenth section of the ordinance contained provisions which, in our opinion, are controlling. "Should the Wilkes-Barre Light Company be prevented by legal procedure before the Public Service Commission * * *, or appeal therefrom * * * to the Superior Court or Supreme Court of the State of Pennsylvania, or by any proceeding at law or in equity of the Courts of Common Pleas of this Commonwealth, not undertaken nor used for the purpose of delay, from exercising and enjoying the privileges herein granted, the said time, specified in sections 2, 10 and 13 of this ordinance, preceding the phrase 'after the passage of this ordinance' shall not begin to run until from the date of the final disposition of such litigation." The ordinance did not contain any provision requiring the company to accept its terms before entering upon the streets. What the municipal authorities said was, practically, "You may enter upon the streets, if you do so you must accept the provisions of this ordinance, by proper corporate action, within ninety days or all your property, equipment, rights and franchises will become the absolute property of the city, but if you are prevented by the legal procedure specified in the fourteenth section of this ordinance from exercising and enjoying the privileges herein granted, the

said time within which you must accept the ordinance shall not begin to run until from the date of the final disposition of such litigation."

This ordinance granting the consent of the city to the entry of the company to the streets was not passed until August 3, 1915, after the enactment of the Public Service Company Law. Article III, section 2, of that statute provides: "Upon the approval of the Commission, evidenced by its certificate of public convenience, first had and obtained, and not otherwise, it shall be lawful for any proposed public service company * * * (b) To begin the exercise of any right, power, franchise, or privilege under any ordinance, municipal contract, or otherwise." Section 11 of the same article of the statute provides that: "No contract or agreement between any public service company and municipal corporation shall be valid unless approved by the Commission"; and provided that, "Upon notice to the local authorities concerned, any public service company may appeal to the Commission, before the consent of the municipal authorities has been obtained, for a declaration by the Commission of the terms and conditions upon which it will grant its approval of such contract or agreement if at all." The municipal authorities evidently assumed that this statute was a valid exercise of legislative power and that it was incumbent upon the company to obtain the approval of the Commission before it could begin to exercise the privilege to enter upon the streets granted by the ordinance. The ordinance did not require the company to enter into any contract until after approval by the Commission. It seems clear that it was the intention of the municipal authorities that the company should obtain the approval of the Commission, as provided by Article III, section 2, paragraph "b" of the Public Service Company Law; "To begin the exercise of the right," to enter upon the streets provided for by the ordinance. What was really sought by the proceeding was the approval by the Commission of the exercise by the company of the right to enter upon the streets conferred by the ordinance. If there has been no valid acceptance of the ordinance by the company, such acceptance is not dispensed with by the approval of the Commission. Whatever rights the company acquires under the ordinance and the approval by the Commission are subject to the conditions by the ordinance imposed. In so far

as the necessity for a valid contract is concerned, it will answer the requirements of the ordinance if there be a valid acceptance within ninety days after the termination of this litigation.

The Public Service Commission did not withhold its approval of the ordinance in this case, and we do not deem it necessary to discuss the question of the power of the legislature to impose upon a public service corporation, under the facts here presented, the burden of obtaining the consent of the Commission before exercising the power conferred by its charter. We deem it safer to wait until some company attempts to exercise such powers without obtaining the approval of the Public Service Commission. There was much testimony taken in this case and the Commission was assisted by very able counsel who presented the contentions of the respective parties. It is not our function to act as a second administrative commission. The finding of the Commission that the approval of this application is necessary and proper for the service, accommodation, convenience or safety of the public is *prima facie* evidence of the reasonableness thereof, and the burden of proving the contrary rests upon the appellant. Whether it is necessary or proper for the service, accommodation, convenience and safety of the public of the City of Wilkes-Barre that their requirements in the matter of heat, light and power cannot be a question of law. We certainly cannot affirm that the determination of the Commission is not in conformity with law. There may be a question under the evidence as to whether the determination of the Commission was reasonable, but it cannot be said that it was without evidence to support it, and in such a case we are not to substitute our judgment for that of the Commission, on a purely administrative question.

The determination of the Public Service Commission is affirmed and the appeal dismissed at the costs of the appellant.

COUNTY COURT OPINIONS.

COMMONWEALTH TRUST COMPANY, TRUSTEES, PLAINTIFF *v.*
THE HUMMELSTOWN CONSOLIDATED WATER CO. AND CHAS.
H. KINTER, RECEIVER, DEFENDANTS.

Corporations—Mortgage—Bonds—Default of interest—Foreclosure.

Notice given by a committee representing more than a majority in value of the outstanding bonds of an election to declare the whole principal of all the bonds secured by the mortgage to be due and immediately payable for default in interest payments is properly served by leaving a copy at the office of the defendant with the clerk in charge.

The plaintiff is limited by the reasons set forth in the above election and may not urge other grounds for declaring the principal due.

An agreement of the bondholders to accept a less rate of interest does not suspend or affect the time for performing the covenants of the mortgage.

Interest paid to persons who had parted with the legal title to their bonds, without requiring the surrender of coupons as provided in the mortgage, is not a compliance with the terms of the mortgage.

Action by the bondholders' committee recommending the "extension" agreement is not a prerequisite to a proceeding to declare the whole of the principal due and payable owing to default in the payment of interest. This was not one of those "conditions" contemplated by the parties for the breach of which the so-called "extension agreement" could be terminated.

In the Court of Common Pleas of Dauphin County. No. 589,
Equity Docket. Bill in equity for foreclosure of mortgage.

Chas. H. Bergner, for plaintiff.

Wm. H. Sponsler and *Geo. R. Heisey*, for defendants

HENRY, P. J., 52d Judicial District, Specially presiding, May 31,
1919:

The plaintiff in this case is asking for a decree authorizing the foreclosure of a mortgage given by the defendants and under which the plaintiff is named as Trustee for the bondholders. The question for determination is whether the plaintiff is entitled to the decree prayed for, involving the default by the defendants in performance of that covenant of the mortgage upon which the

falling due of the principal depends, and the observance of the conditions which make such default operative.

The mortgage provided for the taking possession by the trustee of the property covered by the mortgage, after certain notice and demand, upon the default in the payment of interest, or default in the performance of any of its covenants, continued for ninety days.

For alleged default in the payment of interest, for admitted defaults in the payment of taxes due the Commonwealth of Pennsylvania, covering a number of years, and for alleged defaults in keeping and maintaining the property covered by the mortgage, in good condition and order, the trustee demanded that the possession of the property be turned over to it, which surrender being refused the plaintiff filed a bill in equity in this court, under which a receiver for the defendant company was appointed.

The bonds secured by the mortgage were dated April 2, 1906, and the principal thereof was payable on or before the first day of April, 1926, with interest payable semi-annually on the first days of October and April of each year.

Article VI of the mortgage provided that in the event of default in the payment of any installment of interest upon the bonds, or any of them, or in the performance of any of the covenants of the mortgage, and such default should continue for ninety days, a majority in value of the outstanding bonds could elect in writing and notify the company and the trustee, whereupon the whole principal should be declared by the trustee to be, and should become due and payable.

The company was in default in the payment of interest on the bonds maturing April 1, 1915, and October 1, 1915. On April 10, 1916, a committee representing more than a majority in value of the outstanding bonds, the bonds having been deposited with the committee and by them with the depository, the trustee, as required by the terms of the mortgage, gave notice in writing to the trustee, the plaintiff, that they elected that the whole principal of all the bonds secured by the mortgage should be declared to become immediately due and payable, because of the default in the payment of interest due April 1, 1915, and October 1, 1915, which default had continued for more than ninety days, which

notice was served on the plaintiff and the defendant on April 11, 1916.

Some question has been raised as to the service of this notice upon the defendant company but it is clearly established that the notice was served by leaving a copy at the office of the defendant which was then in charge of the clerk of the president of the Hummelstown Consolidated Water Company, and this clerk looked after the affairs of the company in the absence of the president.

Pursuant to this notice the trustee, on April 12, 1916, gave notice in writing to the defendant, reciting the aforesaid notice and election and declaring the principal and interest of the bonds secured by said mortgage to be due and payable. This election and declaration further recited that the cause and ground therefor, was the default in the payment of interest on said bonds maturing April 1, 1915, and October 1, 1915, which default had continued for a period of more than ninety days.

We agree with the contention of the defendant that this election and declaration are the inception of this foreclosure proceeding and that the plaintiff is limited by the reasons there stated, namely, the default in the payment of interest, as the ground for declaring the principal to be due and payable. It is true that the bondholders might have made the nonpayment of taxes due to the Commonwealth of Pennsylvania and the neglect to keep the property in proper condition and repair, additional grounds for anticipating the due date of the principal of these bonds, but having failed to take advantage of these conditions in the election and notice given to the defendant and the trustee, these reasons cannot now be considered as in any way sustaining this proceeding.

The defendant contends, however, that the bondholders and the trustee are precluded from foreclosure proceedings at this time owing to a so-called "extension agreement" entered into by almost all the bondholders. This agreement was dated July 7, 1915, to be effective October 1, 1915, and embodied the recommendations of a certain bondholders' committee. These recommendations were with respect to bonds of a number of presumably related companies and in some cases provided for a complete suspension of the payment of interest for a certain period

of time, in other cases, for suspension during a period of one year and six months, but in the case of the defendant the provision was that "the interest be reduced from five to four per cent. per annum for a period of three years, so that the taxes due by said company to the Commonwealth of Pennsylvania may be gradually liquidated."

It is very evident that the term "extension" applied especially to those cases in which the total suspension of interest was suggested, and that the provision with respect to the defendant company is not a suspension of the time for performance of the covenants of the mortgage, but simply a forgiving of a portion of the interest. This agreement also provided that the extension might be terminated by the committee "for violation of the conditions upon which the respective extensions shall have been made." Such conditions as there are in this agreement are apparent upon its face and they do not embrace a default in the payment of interest or a breach of the covenants of the mortgage.

On October 21, 1915, holders of bonds aggregating \$75,900, formed what was known as a bondholders' committee, and pursuant to their agreement the bonds with coupons were assigned to a committee under what was designated as an "absolute" sale of the bonds, with power to employ counsel, agents, accountants, engineers, etc., to make expenditures, incur indebtedness, institute suits, pledge and hypothecate bonds, sell the bonds, collect the principal and interest, and reduce the rate of interest for a limited time. By the terms of the bonds the interest was only to be payable upon surrender of the coupons. Subsequent to the surrender and transfer of these bonds and subsequent to the default in the payment of the interest in 1915, Mr. Gring, the president of the defendant, paid the interest, at the reduced rate, to some bondholders who had thus assigned their bonds, and upon \$121,000 of the principal of the mortgage for the payment maturing on April 1, 1915, and upon \$120,000 of the principal for the payment maturing October 1, 1915. No payments were made for 1916.

It is contended that this is a substantial compliance with the provisions of the mortgage relating to payment of interest; but the mortgage provides for the proceeding to declare the whole of the principal due and payable upon nonpayment of the interest

upon any of the bonds and here, admittedly, the interest was not paid upon \$4,000 on April 1, 1915, and upon \$5,000 maturing October 1, 1915. But aside from this, the payment as made was not in accordance with the terms of the mortgage, upon surrender of the coupons, and was not made to the holders of the legal title to the bonds. The assignment by its terms is stated to be "absolute" and yet these bondholders may have had an equitable interest, from the indications upon the face of the agreement, but that equitable interest, as well as the control of the legal title, could only be made available after setting aside the agreement with and transfer to the bondholders' committee. We must, therefore, conclude that the interest due April 1, 1915, and October 1, 1915, was not paid in accordance with the terms of the mortgage, and that such default continued for a period of over ninety days.

The defendant further contends that notice of the election of the bondholders to declare the principal of the bonds due and payable was not given to the defendant, The Hummelstown Consolidated Water Company. Under the amendment to the bill it was established that this notice was left at the office of the company at Harrisburg and in the absence of the president was handed to his clerk or secretary, who was in charge, and who looked after affairs of the company, as well as the business of the president in his absence. This, we think, was good service of a notice, as it would be of process. All other notices were admitted by the answer to have been given.

The default being beyond question and the requirements of the mortgage with respect to declaring the principal due and payable having been followed, the plaintiff is entitled to be granted the relief prayed for.

From the evidence submitted the court finds the following facts:

1. The Commonwealth Trust Company, the Plaintiff, is a Pennsylvania corporation with power to execute trusts, and the Hummelstown Consolidated Water Company, the defendant, is a Pennsylvania corporation organized for the purpose of supplying water to the public of a certain locality. The defendant company is now in the hands of a receiver.

2. The plaintiff is the trustee for the bondholders under a mortgage dated April 10, 1906, to secure a bonded indebtedness of \$125,000, the principal thereof maturing April 1, 1926, and the interest at five per cent. per annum payable semi-annually on the first days of April and October in each year. The interest was payable at the office of the plaintiff upon surrender of the coupons accompanying the bonds.

3. Article VI of said mortgage provided that "in case the company shall make default in the payment of any installment of interest upon the bonds secured hereby, or any of them, or in the performance of any of the covenants herein contained on its part to be performed,* * * * and in case such default shall continue for ninety days, then, and in such case, if the holders of a majority in value of the outstanding bonds hereby secured shall so elect in writing and notify the company, its successors or assigns, and said trustee, the whole principal of all the bonds hereby secured shall thereupon be declared by the trustee to be, and shall immediately become due and payable, and it shall be the duty of the trustee, upon request in writing signed by the holders of a majority in value of said bonds then outstanding, and upon the deposit with the trustee of the bonds then held by those making such request in writing, and upon being indemnified to its satisfaction, to institute proper proceedings at law or in equity to enforce the lien hereby created."

4. The defendant company did not pay the interest upon said bonds maturing April 1, and October 1, 1915, and continued in such default for a period of over ninety days. On October 21, 1915, the bondholders owning bonds secured by said mortgage, aggregating \$75,900, assigned their bonds to the bondholders committee under an agreement declared to be a sale of the bonds and with power to sell, pledge, and generally to exercise the rights of the owner over them.

5. The said bondholders committee on April 10, 1916, by notice in writing given to the plaintiff and the defendant, elected that the whole principal of all the bonds secured by said mortgage should be declared to be due and payable for default in the payment of interest due April 1, and October 1, 1915, which notices were served upon the plaintiff and defendant on April 11, 1916.

6. On April 12, 1916, the plaintiff by a notice in writing duly served upon the defendant declared the whole of the said principal and interest of the bonds secured by said mortgage to be due and payable.

7. Prior to the giving of these notices, bonds, the principal whereof amounted to \$75,900, were deposited with the plaintiff, the trustee, in accordance with the terms of the mortgage.

8. On July 7, 1915, the holders of bonds, secured by said mortgage aggregating \$119,000, entered into an agreement in writing by which the rate of interest upon said bonds was reduced from five to four per cent. for the period of three years from October 1, 1914, and the provisions of a resolution of the bondholders committee representing bond issues of different corporations, dated May 21, 1915, were made a part of this agreement.

9. That after the period of default in the payment of said interest had become complete, Mr. Gring, the president of the defendant, paid to bondholders who had assigned and transferred their bonds to the bondholders committee, interest at the reduced rate upon \$121,000 of the payment falling due April 1, 1915, and upon \$120,000 of the payment falling due, October 1, 1915.

10. The court affirms the first, second and third requests for findings of fact submitted by the plaintiff, and affirms the first, second, third, fourth, fifth, sixth, seventh, ninth, the second paragraph of the eleventh, twelfth, thirteenth, fourteenth, sixteenth, and seventeenth requests for finding of fact submitted by the defendant, and the facts therein stated may be considered as found by the court from the evidence presented.

It is to be noted, however, that the foregoing nine findings of fact cover the essential facts of the case, and a number of those embraced in these requests are rather a matter of the history of this company and have only an indirect bearing, if any, upon the decision of this case.

The eighth, tenth, first paragraph of eleventh, fifteenth, eighteenth requests of the defendant for findings of fact are declined.

The said requests of the plaintiff and defendant are appended to this opinion and may be considered a part thereof.

The court also states the following conclusions of law:

1. The defendant, the Hummelstown Consolidated Water Company, is in default in the performance of the covenants of the mortgage in question, by nonpayment of the interest due April 1, 1915, and October 1, 1915.

2. The so-called "extension" agreement does not extend the time of performance of the covenants of the mortgage and payment of interest as therein provided, excepting that the rate of interest is reduced to four per cent.

3. That action by the committee recommending the extension agreement is not a prerequisite to a proceeding to declare the whole of the principal due and payable owing to default in the payment of interest. This was not one of those "conditions" contemplated by the parties for the breach of which the so-called "extension agreement" could be terminated.

4. The payment of interest by David Gring to the bondholders who had assigned and transferred their bonds to the bondholders' committee, was not a payment of interest as provided for and contemplated by the mortgage.

5. All preliminary steps to elect and declare the whole of the principal due and payable were taken as provided by Article VI of the mortgage.

6. The plaintiff is entitled to a decree of foreclosure as prayed for in the bill.

7. The above stated conclusions are all that are deemed necessary in this case.

The one conclusion of law as submitted by the plaintiff is declined for the reason that it is based upon facts that are not made the basis of the proceeding under the sixth article of the mortgage. The first, second, third, fourth, eighth and twelfth conclusions of law submitted by the defendant are affirmed and should be considered a part of this opinion.

The fifth, sixth, seventh, ninth, tenth, eleventh and thirteenth conclusions of law submitted by the defendant are declined.

DECREE.

And now, to-wit, this 31st day of May, 1919, this cause came on to be heard upon bill, answer, replication and proofs, and upon consideration thereof it is ordered, adjudged and decreed:

1. That the said mortgage is a lien upon the property, franchises, lands, rights of way, engines, pumps, pipes, pipe-lines, poles, wires, reservoirs, intakes, machinery, dynamos, interests and assets, and upon all the estate, right, title, and interest in and to the same of said defendant, Hummelstown Consolidated Water Company, whether the same were owned and described in the mortgage at the date of its execution and delivery, April 2, 1906, or were acquired by purchase, lease or otherwise, subsequent to the execution and delivery of said mortgage, and the holders of said bonds secured by said mortgage are entitled to the benefit thereof.

2. That default was made in the payment of interest on said bonds due on the first day of April, 1915, and on the first day of October, 1915, and that such default has continued with respect to the payment of interest aforesaid, for more than a period of ninety days and that the principal sum of all of said outstanding bonds is now due and payable, and that a public sale of the mortgaged premises, franchises, rights, property and contracts shall be made by the plaintiff, as trustee, in accordance with the terms of said mortgage; and all equity of redemption and other interest of said mortgagor in said premises and franchises, as well any right, title and interest that the said Charles H. Kinter, receiver of Hummelstown Consolidated Water Company, may have in the property thereof, shall be forever discharged and barred, by such sale.

Counsel may submit a supplementary decree, if deemed necessary.

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

1. That Hummelstown Consolidated Water Company has defaulted in the payment of interest on its first mortgage bonds by failing to pay the interest on one or more of said bonds represented by coupons due April 1, 1915, October 1, 1915, April 1, 1916, and October 1, 1916, and that default in payment of said interest has continued for more than ninety days.

2. That Hummelstown Consolidated Water Company has failed to pay taxes due by it to the State of Pennsylvania for the years 1909, 1910, 1911, 1912, 1913, 1914, and 1915.

3. That Hummelstown Consolidated Water Company has failed to keep and maintain the property conveyed by it in the mortgage securing first mortgage bonds to the amount of one hundred and twenty-five thousand dollars (\$125,000) par value in good condition and order.

Conclusion of Law.

1. That by reason of default in the payment of interest on one or more of its first mortgage bonds represented by coupons due April 11, 1915, October 1, 1915, April 1, 1916, and October 1, 1916, and by failure to pay the taxes due the Commonwealth of Pennsylvania and by failure to keep the property conveyed in mortgage in good condition and order, the Hummelstown Consolidated Water Company is in default under the provisions of its mortgage dated April 2, 1906, and recorded in the office of Recorder of Deeds for Dauphin County, in mortgage book "D," Vol. 8, p. 320, and a decree foreclosing the mortgage aforesaid and directing the sale of the premises and franchises covered by said mortgage should be entered.

DEFENDANT'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Findings of Fact.

First. That the Hummelstown Consolidated Water Company, one of the defendants in this bill, did on the 1st April, 1906, execute and issue a certain series of corporate bonds in the aggregate sum of \$125,000 par, protected by a first mortgage on all its property and franchises, and of which mortgage the Commonwealth Trust Company, plaintiff, was constituted mortgagee and trustee, and which bonds are known as said water company's "First Mortgage Bonds."

Second. That said "First Mortgage Bonds," under their terms, bore interest at the rate of five per cent. (5%) per annum, payable semi-annually on the 1st days of April and October of each year and are due, as to the principal thereof, on the 1st day of April, 1926; that said bonds were to be free of taxes which the said water company, the defendant, contracted to pay for all

bondholders, as well all other taxes due by the said water company and which, by law, might or would become superior in lien to the mortgage securing said bonds.

Third. That the said water company, defendant, was unable to pay, and defaulted upon, its semi-annual interest of two and one-half per cent. ($2\frac{1}{2}\%$) on said bonds due on the 1st April, 1915, as well also defaulted in the payment of its taxes due to the Commonwealth, which, at the time of the default in the payment of said interest, had accumulated to the amount of some \$4,677.40, which had then and there become, or was about to become, a lien on the property and franchises of the defendant company prior and superior to the mortgage securing said "First Mortgage Bonds."

Fourth. That by the terms of the said mortgage securing said "First Mortgage Bonds," relating to any default for the nonpayment of any semi-annual interest or for any default for the nonpayment of taxes which might or should become a lien superior to the lien of the said mortgage, or for any other default under said mortgage, it was provided as follows in haec verba :

"ARTICLE VI."

"In case the company shall make default in the payment of any installment of interest upon the bonds secured hereby, or any of them, or in the performance of any of the covenants herein contained on its part to be performed, other than to pay the principal of the bonds hereby secured at maturity thereof, and in such case default shall continue for ninety (90) days, then, and in such case, if the holders of a majority in value of the outstanding bonds hereby secured shall so elect in writing, and notify the company, its successors or assigns, and said trustee, the whole principal of all the bonds hereby secured shall thereupon be declared by the trustee to be, and shall immediately become due and payable and it shall be the duty of the trustee, upon request in writing signed by the holders of a majority in value of said bonds then outstanding, and upon the deposit with the trustee of the bonds held by those making such request in writing, and upon being indemnified to its satisfaction, to institute proper proceedings at law or in equity to enforce the lien hereby created.

Fifth. That of date the 7th day of July, 1915, holders of more than two-thirds par of the \$125,000 par constituting the entire issue of the "First Mortgage Bonds" of the Hummelstown Consolidated Water Company, in consideration of one dollar to each bondholder paid by the defendant company and of certain benefits and advantages to each of them moving from the said Hummelstown Consolidated Water Company, contracted and agreed with said water company, defendant, that they and each of them respectively would take four per cent. (4%) per annum interest on their respective bonds instead of five per cent. (5%), the rate of interest nominated in said bonds, for the period of three (3) years from the 1st of October, 1914.

Sixth. That said agreement was entered into at the instance and upon the recommendation of a certain advisory committee called in said agreement "Bondholders' Committee of the Paxtang Consolidated Water Company, which last named company was then operating said Hummelstown Consolidated Water Company property and was then, and still is, its principal stockholder, which recommendation was as follows:

"(1) That upon the bonds of the Hummelstown Consolidated Water Company, dated April 1, 1906, and known as the "First Mortgage Bonds," the interest be reduced from five to four per cent. per annum for a period of three years, so that the taxes due by said company to the Commonwealth of Pennsylvania may be gradually liquidated" and as contained in a resolution adopted by the said "Bondholders' Committee" at Lebanon, Pa., on the 21st day of May, 1915.

Seventh. That the terms, conditions and limitation, as well the objects and purposes of the said resolution of the 21st May, 1915, adopted by said "Bondholders' Committee," as aforesaid, were specially covenanted and agreed to by the said contracting bondholders with the said Hummelstown Consolidated Water Company and by particular words made a part of the said agreement of the 7th July, 1915, so that said resolution by said agreement became incorporated into the same.

Eighth. That the defendant company, under said agreement of the 7th July, 1915, and in compliance therewith, paid the semi-annual interest at four per cent. (4%) due 1st April and 1st October, 1915, to the said contracting bondholders and to other

bondholders to the amount of about \$120,000 of the \$125,000 issued and outstanding as aforesaid, which interest at said rate per centum each of the holders of said bonds accepted from the defendant company in lieu of the five (5) per centum rate provided in the said bonds.

Ninth. That of date the 29th March, 1916, certain persons, calling themselves the "Bondholders' Protective Committee, Hummelstown Consolidated Water Company," and claiming the right to represent and act for the owners of \$75,900 par of the said first mortgage bonds, notified the plaintiff herein as trustee that such bondholders did elect to demand that the trustee take possession of the plant and property of the defendant company under the provisions of Article V of the mortgage upon three several defaults set out in said notice, to-wit: (a) By a failure to pay the semi-annual interest upon the first mortgage bonds due the 1st April, 1915; and the 1st October, 1915, which default had continued, as alleged, for more than ninety (90) days; (b) By failure to pay the taxes due the Commonwealth by said defendant company as they accrued, thereby permitting a lien superior to said mortgage, and (c) By not keeping the property in good condition.

Tenth. That in accordance with the said notice and demand the said trustee, and plaintiff herein, moved thereto by the said Bondholders' Committee, did, on the 22d April, 1916, at No. 573 Equity Docket of this court, begin, by bill in equity under the terms of the said first mortgage, proceedings to appoint a receiver for the defendant company and thereupon this court did, against the protest of the defendant company, appoint Charles H. Kinter such receiver, who immediately took possession of the defendant's property and its whole income and ever since has had such possession, has solely operated it and been in receipt of the defendant company's whole earnings and income, by which action the defendant company was prohibited from operating its property and paying further interest and gradually liquidating the taxes or keeping the property in as good condition of repair as it was at the date of the appointment of said receiver.

Eleventh. That on the 10th April, 1916, the said committee served a notice on the plaintiff as trustee, on the same basis of bonds, that it elected to demand that the whole issue of bonds be

declared due by the trustee as provided by Article VI of the said mortgage "because of the default which has taken place by the Hummelstown Consolidated Water Company in the payment of interest upon such bond issue due 1st April, 1915, and 1st October, 1915, and which default continued for more than ninety days," but neither prior thereto, then or afterwards served such notice in writing upon the defendant company.

That in accordance with the notice and demand of the said Bondholders' Committee, of date the 10th April, 1916, the plaintiff as trustee, did, on the 12th April, 1916, declare all the bonds of the entire issue due upon the same default mentioned and set out in the said notice and demand of the said Bondholders' Committee of the 10th April, 1916.

Twelfth. That of the said holders of the \$75,900 par principal of the bonds deposited with the plaintiff as trustee, under the terms of the said mortgage and which constitutes the foundation of the right of the plaintiff to move herein upon the demand of a "majority in value of the outstanding bonds," or any bondholders' committee representing such bondholders, the holders of at least \$71,600 par principal of said \$75,900 signed the agreement of the 7th July, 1915.

Thirteenth. That the said bondholders who through their committee moved the court to the appointment of a receiver, through the \$75,900 par principal theretofore deposited with the plaintiff herein as trustee, are identically the same bondholders, the same committee, with the same bonds as a basis, which are now moving the plaintiff herein as trustee to the prayer of the present bill.

Fourteenth. That on or about the 28th March, 1917, subsequent to the filing of the present bill herein and answer filed thereto, the said Bondholders' Protective Committee lodged with the trustee and the plaintiff herein \$24,800 additional first mortgage bonds, the holders of which to the amount of \$21,600, at least, signed the agreement of the 7th July, 1915, with the defendant company.

Fifteenth. That the condition of the plant of the defendant company was at the date of the appointment of the receiver practically the same as it was on the 7th July, 1915, being confined to the slow disintegration of parts of the water power system as to

the dam, sluices, trunks, etc., from decay in the lapse of a number of years; that on the contrary, the whole property, during the life of the mortgage, up to the first default in the payment of interest, had been improved by the erection of a new power house, filtration plant, new water pumps, engines and other equipment both to the water and lighting system to the value of at least \$70,000.

Sixteenth. That the agreement of the 7th July, 1915, contains this provision, viz:

"The extension as to any of the respective issues of bonds shall not become effective or of force until or unless at least a majority in value of the outstanding bonds of said issue shall have signed an agreement of extension," and that this fact was to be evidenced by the certificate of the secretary of the General Bondholders' Committee, which certificate was not signed and delivered to the defendant company until of date the 1st October, 1915.

Seventeenth. That the said agreement of the 7th July, 1915, also contained the following covenant, to-wit:

"For violation of the conditions upon which the respective extensions shall have been made, this committee (the General Bondholders' Committee) or its successor or successors, or a majority of the members thereof, shall determine such extension as terminated and void," and there is no evidence in this case that the said General Bondholders' Committee ever did, as so provided, determine the extension made by the said agreement of the 7th July, 1915, "as terminated and void."

Eighteenth. That the evidence in the case shows that the defendant company paid the interest due on the 1st April and October, 1915, at four (4) per cent. to the extent of about \$120,000 bond principal; that it paid to all who requested it; that it sought to discover the identity and location of the remainder of the bonds to pay them and was unable to do so; that it offered to pay an amount of money to the trustee of the mortgage sufficient to pay the interest on the balance or unknown bonds at five (5) per cent., but the trustee refused to accept any money unless the whole interest on all the bonds outstanding and due 1st April and 1st October, 1915, was paid to it; that so far as the company defendant is concerned, they are not informed to the

present time as to the identity and whereabouts of such unpaid bondholders.

FINDINGS OF LAW.

First. That under the provisions of the mortgage securing the "First Mortgage Bonds" of the Hummelstown Consolidated Water Company, when the principal of the said bonds shall not have become due by the maturity, no power exists in or with the trustee of the mortgage to declare them due for a failure to pay interest as it fell due, or for any other default, except only upon the motion and election of the holders "of a majority in value of the outstanding bonds" and this power can only be exercised and election made after the full expiration of ninety (90) days, and any election made before such expiration is premature, unauthorized and void.

Second. That the election to have declared all the bonds due, as made by the Bondholders' Protective Committee to the plaintiff as trustee, of date the 19th April, 1916, as well the declaration of the plaintiff as trustee, of date the 12th April, 1916, declaring the whole issue of bonds due, was founded upon a single default, to wit, for the nonpayment of the interest due on the 1st April, 1915, and the 1st October, 1915; that the right to have declared such issue matured, like all powers to declare a forfeiture of a common right, is stricti juris, and must be strictly pursued and must be limited to the causes of default set out in the declaration and no other default not named therein can be considered in justification of, or to authorize such declaration.

Third. That the election by a majority in value of the bondholders as provided by Art. VI of the mortgage to have the whole issue of bonds declared to be matured and due by the trustee, must be "in writing" and no part thereof can lay in parole; that this power, being against common right, is stricti juris, in the nature of a penalty, and must be strictly limited to itself to speak its purposes and accomplishment; that no other declaration whether verbal or in writing, made at another time and for a different purpose and unREFERRED to or unconnected by reference with such declaration or election, can be read into it to supply any want or deficiency; that, therefore, this court cannot con-

sider in this bill any other default than that named in the election of the 10th April, 1916.

Fourth. That the demand of the Bondholders' Protective Committee, dated 29th March, 1916, upon the defaults named therein, was for the purpose of securing the possession and operation of the defendant's property by the trustee under Art. V, of the mortgage and can be used, if permissible at all under the facts of this bill, for that purpose only and for none other, and especially to supply any defects or unwritten parts of the election of the 10th April, 1916, the sole authority to the trustee to declare the defendant company's whole issue of bonds matured; and further that any default mentioned in said declaration of the 29th March, 1916, and not mentioned in that of the 10th April, 1916, is considered waived in law.

Fifth. That the election by bondholders, under Art. VI of the mortgage, to declare the entire bond issue matured, being against common right, must be strictly pursued in each of its required steps and proceedings; that it is an essential part of such proceeding that the mortgagor company be notified in writing of such election and the Bondholders' Protective Committee, acting for the alleged majority in value of the bondholders, and whose action constitutes the sole authority herein to the trustee to declare the said issue matured, having failed to notify the company defendant of such election as required by Article VI, the whole proceeding was unlawful ab initio, and the decree in this bill must be in compliance with the prayer of the defendant company.

Sixth. That the agreement of the 7th July, 1915, was executed in accordance with a plan proposed and inaugurated by the resolution of the Bondholders' Committee, which had been selected by the company to be advisory to it and such bondholders who voluntarily signed said agreement; that as such it established in fact and law a policy of action to be pursued as outlined by the resolution of said committee of the 21st May, 1915; that the essential or basic covenant of said resolution and the agreement of the 7th July, 1915, made in conformance therewith, was an extension of time to the respective companies, and, inter alia, the defendant company with the purpose of enabling the defendant company to gradually liquidate the taxes due by the said company to the Commonwealth of Pennsylvania and which had then

become superior in lien to the mortgage protecting said bonds; that the reduction in interest from five per cent. (5%) to four per cent. (4%) was simply a secondary and auxiliary covenant to assist the company defendant to perform its covenant to gradually liquidate the said taxes.

Seventh. That the agreement of the 7th July, 1915, was founded upon a sufficient consideration and when followed by the payment of the reduced interest named therein by the defendant company, and the acceptance of it by the bondholders signing the same in accordance with the covenants of said agreement, the said agreement is binding on all bondholders executing the said agreement;

That the effect of the said agreement of the 7th July, 1915, as to each of the respective bondholders signing the same, was a covenant to grant for the period of three years from the 1st October, 1914, the right to the debtor company to discharge its interest obligations to such bondholder signing the agreement by paying the reduced rate in order that the taxes due the Commonwealth, then superior in lien to the mortgage protecting the bonds of such holder, might be "gradually liquidated," provided that a majority in value of the holders of all outstanding bonds agreed to like covenant; that each further agreed that if such majority was obtained, no action would be taken by such bondholder, as one of such majority, to enforce the provisions of the mortgage upon default in the payment of interest for the said period of three years; that the "majority in value of the outstanding bonds" mentioned in paragraph (c) of the conditions of the said agreement contemplated and had reference to the majority mentioned and required to take possession of the property or foreclose it, as mentioned in Article V and VI of the mortgage, and each bondholder signing said agreement thereby covenanted that he would not, for the said period of three years, be or become one of any majority to take possession of or move for the foreclosure of the defendant company's property.

Eighth. That under the plan inaugurated by the resolution of the Bondholders' Advisory Committee of the 21st May, 1915, and which was incorporated into and made a part of the agreement of the 7th July, 1915, a tribunal was set up to decide upon any default arising under said agreement, that is to say, the ad-

visory committee aforesaid, who, upon the execution of the agreement of the 7th July, 1915, by a majority in value of the bondholders, became the controlling body to manage and direct the affairs of the defendant company and to decide upon any "violation of the conditions upon which the respective extensions" were made, and this court is without jurisdiction to decide whether any default under said plan and agreement has been made by the defendant company, so far as concerns all bondholders adopting said committee's plan and signing the agreement of the 7th July, 1915.

Ninth. That the interest due on the 1st April and October, 1915, having been paid and accepted by more than a majority in value of the holders of all the outstanding bonds in the fulfillment and execution of the agreement of the 7th July, 1915, all of the said majority of bondholders having signed said agreement, then for all the purposes of this bill, no default in the payment of interest occurred until the interest which fell due on the 1st April, 1916, was not paid by the defendant company on that day, which default must have continued for the full period of ninety (90) days thereafter, or until the 1st day of July, 1916, before the power to declare bonds matured upon a default accrued to any majority in value of the holders of any said bonds; that the election to declare or have declared the whole issue of bonds matured as made by the notice and declaration of the 10th April, 1916, was, therefore, premature and void.

Tenth. That if it shall be the opinion of the court that defaults mentioned and set out in the election for possession dated the 29th March, 1916, made by the Bondholders' Committee, can be read into the declaration of the 10th April, 1916, demanding the maturity of all the bonds, we pray the court to find:

(a) That as the very and sole purpose of the extension contemplated by the agreement of the 7th July, 1915, was the "gradual liquidation" through three years of the then accumulated taxes, a reasonable time to begin and consummate such liquidation is contemplated by the law, and as only six months had elapsed from the date the said agreement became effective by the declaration of the secretary of the advisory committee of the 1st October, 1915, during which the evidence shows that the defaults in the payment of interest due 1st April, 1915, and the 1st

October, 1915, had been extinguished, not only to the bondholders signing said agreement, but to all known bondholders of the company and within some \$5,000 of the entire bond issue, which the company had made an effort to pay, no such time had elapsed under the circumstances which will warrant this court in declaring that a breach of the covenant to gradually liquidate the taxes had occurred on the 10th day of April, 1916.

(b) That with respect to the condition of repairs of property under the covenant "to keep and maintain the property hereby conveyed in good condition and order" the undisputed evidence showing that repairs and betterments having been made by the company to the extent of more than \$70,000 since the execution of the mortgage, and that any condition of disrepair existing on the 10th April, 1916, was the result solely of the slow decay of the dam, trunks, stocks, etc., of the water system, being the result of the action of time through many years, and there being no evidence that this condition was substantially different than it was on the 7th July or the 1st October, 1915, there is nothing to warrant this court in declaring a breach of the agreement of the 7th July, 1915, or that any condition existed under all the circumstances detailed that would justify this court in declaring a default upon which the bondholders might require a declaration that the whole bond issue of the company had become due upon which its whole property could be sold from it; and further, that any condition of disrepair existing at the date of the execution of the agreement of the 7th July, 1915, was waived by the agreement of the extension as it was made no part of the conditions upon which the extension became operative, and no bondholder will be permitted to write into the agreement a new condition relating to a matter in existence at the date of the agreement.

Eleventh. That if the evidence shows to the satisfaction of the court that this defendant company paid the reduced interest, not only to the bondholders signing the agreement of the 7th July, 1915, but all others applying for the same, so that all were paid except an amount less than two hundred dollars; that it sought to find the holders of the bonds unpaid, to pay them, and could not discover them; that it offered to deposit with the trustee the interest for such unfound bondholders at the full rate provided in the mortgage which the trustee refused to receive unless the

whole interest on all the bonds was paid to it, then, as the law does not require an apparently impossible or vain thing to be done, there was no such default as any bondholder signing the agreement of the 7th July, 1915, can enforce by the present bill.

Twelfth. That the declaration of the Bondholders' Protective Committee dated 10th April, 1916, that they elected to have the trustee declare the entire issue of bonds due under Article VI, of the mortgage, speaks from the date thereof and if the said declaration was premature or unlawful by reason of an inadequate number of bondholders in value making said demand or any other reason, such defect is a fatality and is not cured by the deposit of the \$24,800 of bonds on the 28th March, 1917, nor do those bonds change nor effect the status of the parties to this bill at its inception.

Thirteenth. That the action of the plaintiff in this bill in requiring possession of the defendant's property for the defaults mentioned in the demand of the 7th April, 1916, and procuring the appointment of a receiver by its bill at No. 537 Equity Docket, was unjustified, without warrant and unlawful; that it is now its duty to restore its property to the defendant company as near in statu quo as of the date of such unlawful interference as is reasonably possible, paying the costs of the receivership and all other costs, outlay and expenses incident thereto; as also damages to the defendant company for its unlawful act; and further that the unlawful action of the plaintiff was, in equity a suspension of the defendant's right to the possession, care and operation of its property and that it is entitled, by proper decree, to an order of restoration for the unexpired term or portion of the three years provided in the agreement of the 7th July, 1915.

PUBLIC SERVICE COMMISSION OPINIONS.

DAMAGES RESULTING FROM ABOLITION OF GRADE CROSSING.

Crossings—At grade—Abolition of—Alleged damages suffered as result thereof—Damnum absque injuria.

The owners of property which is not adjacent to an abolished grade crossing who suffer inconvenience as a result of the closing thereof are not entitled to damages. It is *damnum absque injuria*.

APPLICATION DOCKET No. 2126—1918.

Report and Order of the Commission.

Robert S. Gawthrop and Walter S. Talbot, for applicants.

J. E. B. Cunningham and Spencer Gilbert Nauman, for protestants.

BY THE COMMISSION July 14, 1919:

The application in this case is for the determination of damages to the property of Morris T. Phillips and James Scully for property taken, injured or destroyed in re proceedings on petition of the Pennsylvania Railroad Company (A. 1906-1918) for the abolition of a crossing at grade at a point where the tracks of said railroad company cross a public highway known as "Red Road," in Valley Township, Chester County.

Red Road runs in the general direction of north and south connecting the Lincoln Highway with Valley road and crossing the tracks of the Pennsylvania railroad at grade about one-fourth mile north of Valley road.

The property of Morris T. Phillips and James Scully is situate on Red road about one-half mile from Valley road and one mile from the Lincoln Highway and consists of about seven acres of land on which is located a stone quarry. The distance from the stone quarry to the crossing that was abolished in the direction of the Valley road, is about 1,200 feet.

The applicants contend that they have been operating the stone quarry on their premises and that the only market for their stone is along the Valley road, extending from Pomeroy to Coatesville, and that the most direct and easy way to deliver their stone to said market was south on Red road down grade to the Valley road, and that by reason of the abolition of the crossing at grade on Red road they would be compelled to go north on Red road and up a steep grade to the Lincoln Highway, thence on the Lincoln Highway to Coatesville or on the Stove Pipe road to Pomeroy; that the haul north to the Lincoln Highway thence to Coatesville is about two miles farther and more difficult on account of the up-grade than the haul south on Red road to the Valley road and thence either to Coatesville or Pomeroy.

Under these circumstances are the applicants entitled to damages?

The abolition of the crossing in this proceeding by the closing of the highway at the right of way line of the railroad will undoubtedly inconvenience the applicants, but it is an exercise of a power of government for the benefit of the people as a whole. In the interests of safety, the State refuses to permit persons to cross the tracks at the point in question, and damages which may result to complaiants from this action are *damnum absque injuria*. In our opinion, the property of the applicants is not adjacent to the crossing which has been abolished and they are for this reason not entitled to compensation for damages under the act.

The application will therefore be dismissed.

Commissioner Rilling dissents.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof;

Now, to wit, July 14, 1919, it is ordered: That the petition in this proceeding be and the same is hereby dismissed.

APPLICATION OF M. C. MOHR AND L. W. SCHNATTERLY, ET AL.
FOR DETERMINATION OF DAMAGES RESULTING FROM THE EL-
EVIATION OF THE TRACKS OF THE PENNSYLVANIA RAILROAD
IN FREEPORT, PA.

*Railroads—Crossings—At grade—Elimination of—Closing of
certain streets—Resulting damages to property holders.*

Application was made to the Commission for the determination and apportionment of damages resulting from the carrying out of the provisions

of Municipal Contract 197—1915, approved by the Commission, authorizing the vacation and elimination of certain grade crossings, and the elevation of the tracks of the Pennsylvania Railroad in the Borough of Freeport, Pa.

The Commission in determining the rights of the applicants found that the streets involved were in fact public highways, having been dedicated to the public and used by it for a great number of years.

Following the Pennsylvania court decisions, the Commission held that the use by the public or individuals of the right of way of the railroad for a period of twenty-one years or more, vested no property rights in the applicants to or upon the right of way, and that no damages resulted from closing the same to the public.

It was held that the closing of two streets and the narrowing of another worked no hardship upon those applicants who were provided with a safe means of crossing the tracks at other nearby points.

The applicants who owned property immediately adjacent to the railroad right of way and who suffered a decrease in the value of their property by reason of the elevation of the tracks were awarded damages in the amount set forth in the report.

No damages were allowed any of the applicants for noise, dust, smoke, etc., resulting from the operation of the railroad at its present elevation; 116 Pa. 472.

APPLICATION DOCKET 1484—1917.

Report and Order of the Commission.

C. E. Harrington, Harry C. Golden, and S. F. Clark, for applicants.

Orr Buffington, Chas. H. Bergner, and Spencer Gilbert Nauman, for P. R. R.

Hazlett, McVicar & Gardner, for Borough of Freeport.

RILLING, Commissioner:

The Borough of Freeport, Pennsylvania, incorporated in 1833, has a present population of about 2,500, and is situate in Armstrong County, on the west bank of the Allegheny river, about twenty-eight miles north of Pittsburgh. The town was laid out prior to 1800 by one David Todd, according to a plan not recorded. In said plan, Water street, without a defined width, extends along the river front: First, Second, Third, Fourth, Fifth, and Sixth streets, each 60 feet wide, extend at right angles therefrom. Market street, the main street of the borough, also sixty

feet wide, parallels Water street 330 feet therefrom. Midway between Market and Water streets is Walnut alley, twelve feet wide. Each block between Market and Water streets is laid out in ten lots, five fronting on Water street and five on Market street, sixty-six feet in width and having a depth of 159 feet to Walnut alley. While the general course of the Allegheny river is north and south at Freeport it runs east and west. This will explain the points of the compass as referred to in this report.

Prior to 1827 the State of Pennsylvania condemned the right-of-way for the western branch of the Pennsylvania canal extending from Pittsburgh northwardly along the west bank of the Allegheny river to a point opposite the confluence of the Kiskiminetas and Allegheny rivers, which is a short distance east of Freeport. The canal right-of-way extended through Freeport between Water and Market streets, with a curvature toward the river. It covered Walnut alley from a point beginning about 100 feet west of Second street eastwardly to a point about 100 feet east of Fourth street, so that at Third street, Walnut alley was practically under the middle of the canal. Where the canal right-of-way extended south of Walnut alley it occupied the rear part of the lots fronting on Water street.

Where Walnut alley was not occupied by the canal it was used as a public alley and where it was included within the limits of the canal the public used the towpath instead. A lock in the canal extended from Fourth street eastwardly and a basin reaching from Fourth street westwardly to Second street permitted the turning of canal boats.

The canal was constructed in 1827 and continued to be operated until about 1857, when it was acquired by the predecessor of the respondent. At first a single line of track was constructed thereon and later a second track was laid.

The canal proper consisted of the canal bed with a towpath on the river side and a berme bank on the opposite side. The canal at the water level was forty feet wide, the towpath ten feet and the berme bank six feet. Both the towpath and the berme bank were raised two feet above the water level of the canal. The slopes thereof inclined eighteen inches for each one foot rise, making the normal width of the canal sixty-two feet. The contracts for its construction provided for the clearance of

stumps and of vegetable matter, for a space of forty feet on each side of the centre line of the waterway. By a map attached to the record in the case of *P. R. R. v. Freeport Borough*, 138 Pa. page 91, and from other maps offered and from the evidence it would appear that the canal right-of-way acquired by respondent west of Fourth street was of a varying width, the widest points being at or near Third street, where the basin was located, and west of First street.

After the acquisition of the canal by the railroad company and the construction of its tracks thereon, the public continued to use the towpath on the south side and a portion of the canal property which extended from the tracks northwardly to the rear end of the lots fronting on Market street, for highway purposes, down to the time the improvements hereinafter mentioned were made. Between First and Second streets a public siding was constructed which was used for the purpose of receiving and shipping freight by the public.

Many of the parties owning lots fronting both on Water and Market streets and extending back to the canal property during the time the canal was in operation and afterwards during the operation of the railroad, built dwelling houses and other buildings on the rear end of their lots, many of them fronting on the canal property. Access to many of these buildings could only be had over this canal right-of-way.

During the time the canal was in operation there was a twenty-foot bridge over the same at Second street, also at Fifth street, and a foot bridge at Sixth street. When the railroad was constructed the bridges over the canal were removed and grade crossings opened at First, Second, Third, Fourth, Fifth and Sixth streets. There is no evidence that any official action was ever taken by either the borough or the railroad company to open these streets at grade across the railroad tracks and the canal right-of-way. These crossings were planked from eighteen to twenty feet in width and from the time they were opened down to the making of the improvements were used by the public the same as any public street in Freeport. Respondent contends that no streets had ever been legally laid out at the point of the six grade crossings over its right-of-way; that its permissive use by the public did not constitute these crossings public highways.

The Act of 1833, P. L. 320, incorporating Freeport Borough, contains the following provision:

"Provided that this act shall not be considered as giving any jurisdiction or authority whatever to the Borough of Freeport in and upon the Pennsylvania Canal and its appurtenances."

The Pennsylvania Railroad Company, desiring to elevate its tracks through the Borough of Freeport, entered into a contract with the municipal authorities dated March 16, 1915, which contract was duly approved by this Commission.

In said contract it was provided, inter alia:

The borough should within the respondent's right-of-way vacate streets as follows:

First street entirely closed.

Second and Sixth streets reduced in width sixty to thirty feet.

Third street entirely closed, except a passage way twelve feet wide in the centre, restricted to pedestrian travel.

Fourth and Fifth streets—width not reduced but piers to be erected at the centre and curb line to support overhead bridges.

Respondent to fill Water street to the grade fixed by the borough and curb and pave the same twenty-four feet in width, with brick.

Respondent to elevate its tracks and carry the same over Second, Fourth, Fifth and Sixth streets, according to specifications in said contract.

Certain parts of the canal right-of-way not required by respondent to elevate its tracks to be conveyed to the borough for public highway purposes.

The entire cost of the improvements, including the grading upon Water street and all damages to property owners, if any, to be paid by the railroad company.

Upon the approval of the contract by the Commission, the railroad company began the work of elevating its tracks by erecting two cement walls of varying height extending from the west side of First street, eastwardly, past Sixth street. The distances between outer surfaces of these cement walls located by the company upon its right-of-way, as claimed by it, vary from 60.09

feet at Fourth street to 86 feet at First street. Between the outer lines of the cement walls First street has been entirely closed. Second and Sixth streets narrowed from sixty to thirty feet, Third street closed, save for a twelve-foot pedestrian passageway along the centre. Structures to carry respondent's elevated tracks have been erected over Second, Fourth, Fifth, and Sixth streets. Piers in Fourth and Fifth streets, supporting the superstructures are placed at the centre and curb lines. The space between the cement walls, extending from First to a point east of Sixth street, has been filled with cinders and other materials and the elevated tracks of the company laid thereon, and its road is now operated over the same. The six grade crossings are abolished. The company has constructed and occupies its new passenger station on Third street, adjacent to its tracks. At the time of taking the testimony, the company had offered a deed to the borough for the portions of its right of way designated in the contract which were to be conveyed to the borough for highway purposes. Some question had risen as to the character of the conveyance offered, but no claim was made that the property conveyed is not in compliance with the contract.

In constructing the concrete walls a line of openings known as "weep holes" about four inches in diameter, and placed a short distance above the surface of the ground, at varying intervals, were built therein, for the purpose of permitting such water as would not seep away to be carried off. The amount of water flowing therefrom is very limited. Where such openings are on the property line, the property owners in the future, if in any way injured thereby, have their remedy.

Sixth street, between the respondent's right-of-way and Water street, was filled by the company to the grade established by the borough. Water street (in which a sewer had been laid by the borough, of which abutting property owners on the north side had paid twenty-five per cent. of the cost) from Sixth street westwardly to a point west of First street, was also filled to the grade fixed by the borough, curbed and paved for a width of twenty-four feet, with brick. There was some evidence to show that the roadway in First street between the right of way of respondent and Water street had also been slightly raised, but not to such an extent as to affect the adjacent property.

Upon the completion of the work, twenty-eight applicants owning thirty-six properties in Freeport borough claimed that their respective properties had been injured by the improvements made by the railroad company, and the vacating and raising the grade of the streets, and asked the Commission to determine the damages suffered. Pursuant thereto the Commission held several hearings, at which a large amount of testimony was offered.

The several claimants were for reference each numbered, as follows:

<i>No.</i>	<i>Owner.</i>	<i>Location.</i>
1	Louther, Anna, Mary and	
	Serepta,	Water St., N. W. cor. First.
2	Donnelly, Mary,	Market St., S. E. cor. First.
3	Nolf, Antes,	Water St., west of First.
4	Berupe, L. N.	Market St., bet. 4th & 5th.
5	Hastie, J. W.,	Market St., bet. 2d & 3d.
6	Schnatterly, L. W.,	Market St., bet. 2d & 3d.
7	Louther, Anna, Mary and	
	Serepta,	Sixth St., bet. Water & R. R.
8-A	Maxler, Frank, Trustee, ..	Water St., bet. 5th & 6th.
8-B	Maxler, Frank, Trustee, ..	Water St., bet. 1st & 2d.
9	King, Edward & Elizabeth,	Water St., bet. 1st & 2d.
10	Nolf, Margaret B.,	Water St., bet. 2d & 3d.
11	Geraci, Antoni,	Market St., bet. 2d & 3d.
12	King, Edward S.,	Market St., bet. 2d & 3d.
13	Emsweller, R. D.,	Water St., bet. 1st & 2d.
14	Reno, M. & E. M.,	Fourth St., bet. Market & R. R.
15	Cummings, Lilly,	Water St., bet. 2d & 3d.
16	Hawk, Catharine,	Railroad, east of 4th.
17-A	McCoy, Leah,	Water St., N. W. cor. 3d.
17-B	McCoy, Leah,	Railroad, corner 4th.
18	Hundertmark, F. L.,	Water St., bet. 4th & 5th.
19	Bauer, Otto,	Water St., bet. 2d & 3d.
20	Lacey, Josephine,	Railroad & 2d.
21	Holmes, J. H.,	Water St., N. W. cor. 4th.
22	Mohr, M. C.,	Railroad & 4th.
23	Scheitle, Joseph,	Market St., S. W. cor. 5th.
24-A	Hosey, Margaret,	Water St., N. W. cor. 3d.

<i>No.</i>	<i>Owner.</i>	<i>Location.</i>
24-B	Hosey, Margaret,	Water St., bet. 3d & 4th.
25	Shirley, Martha,	Water St., N. E. cor. 1st.
26-A	Meyer, Rosa,	Water St., N. E. cor. 4th.
26-B	Meyer, Rosa,	Water St., bet. 4th and 5th.
26-C	Meyer, Rosa,	Railroad & 5th.
27	Hild, Henry, Estate,	Railroad & 2d.
28	Tamuscheit, Herman,	6th & Water St.

The several claims, as made, may be classified as follows:

(a) Those claiming damages by reason of the partial or entire closing and vacation of streets, between the lines of respondent's right-of-way. None of claimants own any property abutting upon those parts of the streets entirely vacated or reduced in width.

(b) Those claiming damages by reason of the changing of the grades and filling of the streets to the grade established by the borough.

(c) Those claiming damages by reason of the construction of the concrete walls at their present location in front of properties of claimants, thereby entirely shutting off or interfering with their access, which had been enjoyed by them for more than twenty-one years.

(d) Those claiming damages by reason of the building of concrete walls upon premises alleged to be owned by the claimants.

(e) Those claiming damages by reason of the construction of concrete walls and elevating the tracks of respondent in front of their properties and upon so much of the streets vacated or narrowed, thereby shutting off their view and access, interfering with their ventilation, exposing their property to danger on account of the operation of respondent's road at its elevated position, as well as on account of the damages from noise, smoke, and other interference caused by the operation of respondent's road.

At the hearings all of the complainants, the borough and the respondent railroad company, were represented by counsel. The damages, if sustained, were all assumed by the respondent company and an agreement was placed on the record to the effect that the Commission should proceed to ascertain the same, on the

theory that the respondent company was liable therefor and that, subject to the right to appeal by either party, all questions and issues raised by the several applications should be considered and determined by the Commission.

From the claims as made and from the evidence adduced, there arise for our determination, before we can proceed to ascertain and determine what, if any, damages any or all of claimants have sustained, certain legal questions which we will state and dispose of in the following order:

First. Were First, Second, Third, Fourth, Fifth and Sixth streets, at the point of the grade crossings thereon over respondent's tracks, public highways?

Second. Did claimants owning property fronting on respondent's right-of-way acquire any interest therein or access to and from their several properties over the same, by reason of their having enjoyed such access and right-of-way for more than twenty-one years?

Third. Has a property owner, whose property does not abut upon the part of a public street vacated, reduced in width, or on which piers have been erected, at the centre and curb lines, by proper action of the borough authorities, a right to damages?

Fourth. Where a railroad company elevates its tracks on its own right of way and operates its road thereon, is an abutting or adjacent property owner entitled to damages by reason of the construction and operation of such elevated railroad?

Fifth. Where a municipality, by a contract with a railroad company, provides that the railroad company shall raise the grade of a certain street and pave the same to a specified width, can a property owner whose property abuts thereon claim damages for injuries caused by such change of grade?

Some of the claimants ask for damages for the reason that the respondent company constructed its concrete walls upon and is now occupying a part of their premises. This is particularly true as to the claim of L. N. Berupe, No. 4, whose premises front on Market street between Fourth and Fifth streets, extending back to the canal right of way at a point where the canal lock was located. It appears that a stone wall marked the north water edge of the canal along this lock, extending from Fourth street eastwardly. Evidence was offered to show that the concrete wall

as now constructed extends northward on the lot of said Berupe, witnesses testifying to the removal of the stone wall at the water edge of the canal as well as of certain trees standing on the bank north thereof. Evidence was also given indicating the location of the rear lot line of said Berupe, and that the north side of the concrete wall as now constructed extends several feet onto the claimant's lot as indicated by the rear lot line testified to.

The concrete wall as now constructed extends from Fourth to Fifth street in a straight line, and all maps offered in evidence indicate that the north line of the canal right-of-way between Fourth and Fifth streets was a straight line. If this is the case, it would not be possible for the company to encroach upon the property of Berupe without also at the same time encroaching upon the adjoining premises.

All the lots in said square fronting on Market street extend back the same distance to the canal. If the rear line of the Berupe lot extended further south or beyond the straight line marking the canal right of way there evidently was an encroachment thereon, and we have elsewhere held in this report that such an encroachment cannot vest any interest or title in the claimant.

There was also some testimony offered that the concrete wall encroached on the property of Josephine Lacey, No. 20, at Second street and railroad, as well as on the property of Leah McCoy, No. 17B, at the railroad and Fourth street. Respondent contends and offered evidence to show that the concrete walls it has erected are all constructed on its own right of way, the lines being carefully ascertained by survey.

Under all the evidence the Commission finds as a fact that the concrete walls as they now are erected stand on the right of way of the respondent railroad company and that at no place does the railroad company occupy the property of any of the claimants.

First. Were the six streets at the point of the six grade crossings public highways?

There can be no question that when David Todd made a plan dividing his land into lots and streets, and then sold lots according to this plan which showed the six streets involved in this case, he thereby dedicated these six streets to public use, and left them to be opened by the proper local authorities at such times as

the public interest might require. If authority is needed it may be found in the following and other cases: *McCall v. Davis*, 56 Pa. 431; *Davis v. Sabita*, 63 Pa. 90; *Transue v. Sell*, 105 Pa. 604; *In re opening of Pearl Street*, 111 Pa. 565; *Quicksall v. Philadelphia*, 177 Pa. 301; *Higgins v. Sharon Borough*, 5 Pa. Superior Ct. 92.

It must be conceded that when the Pennsylvania canal condemned its right of way through this land it acquired a fee simple title thereto. But this did not necessarily abolish or vacate the public streets over which the canal right of way was laid. The public having acquired a right in these streets, the canal company could not wholly extinguish the right or encroach on it more than its own necessities required: *Commonwealth v. Ruddle*, 28 W. N. C. 227; *Road in Lehigh Township*, 1 North. 220. The canal company recognized its legal obligation in this respect by constructing bridges over the canal, and allowing the use of parts of its right of way so that all of these streets might be available to public use. This was the situation when the Borough of Freeport was incorporated in 1833. The proviso in the Act of Assembly, hereinbefore quoted, cannot be given the effect of extinguishing existing public rights. True, the rights of the canal company were acquired before the incorporation of the borough. However, this proviso to the act of incorporation was only intended to withhold from the borough jurisdiction and authority that might be exercised in derogation of the company's rights. It does not mean that existing public streets crossed by the canal were abolished, or that the borough might not accept the prior dedication which had been made of these streets to public use and assume jurisdiction over them, nor that the canal company and the railroad companies could not rededicate them to public use so far as they crossed their rights of way, and that the borough thereupon could not accept such dedication.

This suggests the inquiry—Did the borough accept the dedication of these streets to public use, as made by David Todd and subsequently concurred in by the canal and railroad companies, and assume jurisdiction and control over them? It does not appear whether any formal action of this character was ever taken by the borough or not. It is not necessary that there should be. The streets were unquestionably dedicated to public use: they

were opened and used by the public for nearly seventy years and this, in itself, is evidence of their acceptance by the borough. *Commonwealth v. Moorehead*, 118 Pa. 344; *Commonwealth v. Shoemaker*, 14 Pa. Superior Ct. 194; *Commonwealth v. Llewellyn*, 14 Pa. Superior Ct. 214; *Weida v. Hanover Township*, 30 Pa. Superior Ct. 424; *Ackerman v. City of Williamsport*, 227 Pa. 591.

It appears that the streets had been recognized and used by the public as borough streets for more than half a century, prior to the time when the borough entered into the agreement with the respondent for abolishing the grade crossings as hereinbefore noted, and these facts, without more, conclusively establish not only that the dedication of the streets to public use was accepted by the borough, but also that the borough had assumed jurisdiction and control over them.

The streets as originally dedicated, and accepted by the public by user, were sixty feet in width, and this width extended across the respondent's right of way. But only a portion across the tracks of the respondent was planked and used by the public. The maintenance, however, of only a certain portion of a public street does not work a surrender of any of the dedicated width. *Commonwealth v. Shoemaker*, 14 Pa. Superior Ct. 194. Neither adverse possession nor nonuser will bar the right of the public to the use and enjoyment of the whole width of the street as dedicated and accepted. *Commonwealth v. Moorehead*, 118 Pa. 344. A street can no more be obstructed partially than closed altogether. *Kopf v. Utter*, 101 Pa. 27.

It follows, from the foregoing statement of facts and the law applicable thereto that the first question suggested for consideration must be answered in the affirmative.

Second. The title in fee to the right of way now owned by respondent was acquired by its predecessor when the latter became the owner of the western division of the Pennsylvania canal. The courts have held that when the Commonwealth condemned the right of way for the Pennsylvania canal it took a title in fee simple and the railroad company now holds by the same title as did the Commonwealth. See *West. Pa. R. R. Co. Appeal*, 99 Pa. p. 155, wherein it is held:

"The validity of appellant's title and its right to hold and use the strip of land known as the canal lot for railroad purposes can not be doubted. It has been definitely settled, by an unbroken line of decisions, that the Commonwealth acquired an absolute estate in perpetuity in the land taken and occupied for canal purposes, and by virtue of the act authorizing the sale of the main line of the public works and sundry mesne conveyances, that title, which for all practical purposes was a fee simple, became vested in the appellant company: *Comm. v. McAllister*, 2 Watts 190; *Haldeman v. Penna. R. R. Co.*, 14 Wright 425; *Craig v. Allegheny City*, 3 P. F. Smith, 477; *Robinson v. West Penna. R. R. Co.*, 22 P. F. Smith 316. By subsequent legislation the appellant was authorized to construct and maintain on the bed of the canal a railroad with branches, etc."

Respondent's right of way in the Borough of Freeport was therefore held by it in fee simple. There was no evidence offered to show that it ever abandoned any part of its right of way by official action. Complainants contend that by the permissive use of the towpath and certain other parts thereof, as hereinbefore stated, for a period of more than twenty-one years, they acquired a right of passage over the same to and from their respective properties. A long line of decisions of both our common pleas and appellate courts uniformly hold that the right of way of a railroad company cannot be encroached or infringed upon, nor any right or claim acquired thereon, by the continued use or occupation thereof, no matter how long such use or occupation has continued. We cannot better express our mind than to quote from the opinion of Judge Butler, as reported in *Glisson v. Chester Valley Railroad Company*, 15 D. R., p. 371, as follows:

"After careful examination of the authorities and consideration of the question, we are of opinion that in Pennsylvania a railroad's right of way is vested with substantially all of the principles of inviolability that pertain to a public highway; that where the company has occupied but a part of its right of way and the balance has been used, however, long, under circumstances that would, as between individuals make a title by adverse use, no title arises as against the company and no one purchasing land abutting upon its right of way may have the way contracted to the limits actually in use by

the company at the time, no matter how clearly the conditions on the ground and the absence of record proof justify the purchaser in assuming that the land occupied by the company is the extent of its right of way. The company is but an agency through which the public is served; its right of way is the public highway over which the public is entitled to be carried as it is privileged to walk or drive upon streets and roads. Actual occupancy, by an abutter, of a part of the right of way under a claim of title, for however long a period, will not invest him with title, but will merely cast upon the company the burden of proving that the land in controversy was included in its location, and a purchaser of such abutter's title without knowledge, actual or constructive, of the true lines of the right of way will fare no better than his predecessor, for there is no requirement that the location should be anywhere filed or recorded."

In the case of *Pennsylvania Railroad v. Borough of Freeport*, 138 Pa., p. 91, the court had before it a contention arising over this canal property. In affirming the court below, it held that although the railroad company did not occupy all of its canal right of way, a permissive use of a part thereof by the public as a passage way for more than twenty-one years did not vest in the public any right thereto, and that the railroad company might, at any time it desired to use the same, take possession thereof.

Judge Reed, in *Gillespie v. B. R. & P. R. R. Co.*, 33 County Court Reports, p. 513, affirmed by the Supreme Court, 226 Pa. 31, held, where a railroad company acquired a right of way by condemnation proceedings, and built its road thereon, paying the owner for his damages, and having elevated its tracks upon piers and filled in the same without occupying any land outside of its right of way, the adjacent property owner whose land was condemned for the right of way cannot receive damages a second time for any injuries caused by the elevation of said tracks, as such damages are *damnum absque injuria*.

The following cases hold no right can be acquired over any portion of a railroad company's right of way, no matter how long such use may have continued: *P. & R. Ry. v. Obert*, 109 Pa. 193; *Ry. Co. v. Peet*, 152 Pa. 492; *Ry. Co.'s Appeal*, 122 Pa. 530; *Reading v. Seip*, 30 Superior Ct. 330.

We therefore conclude that none of claimants acquired any property right to or upon respondent's right of way.

There is no doubt that some of the claimants' properties have been materially injured by the construction of the cement walls by respondent, in close proximity thereto, as well as by shutting off their access to and from the same. Some of the buildings are so situated that it is practically impossible to reach them without passing over the railroad right of way. Claimants were evidently under the impression that they, together with the public, had, by the long continued use, gained some permissive right over respondent's right of way, and accordingly constructed their buildings in the manner shown. It is unfortunate that they did not have a better understanding of their rights.

Third. Some of claimants contend they have sustained damages by reason of the closing of First and Third streets, the narrowing of Second and Sixth streets, and the construction of piers at the centre and curb lines of Fourth and Fifth streets. The damages claimed are for interference with the access to their properties as well as interference with their light, ventilation, view, etc.

Before the respondent made its improvements in Freeport, it operated a double track road through the borough with six grade crossings thereon. Its traffic was increasing. Persons who desired to cross respondent's tracks were obliged to do so at a grade crossing, subjecting themselves to all the risks and inconveniences incident thereto. While the streets may have been laid out sixty feet in width at the point of crossing, their actual use was confined to not more than twenty or twenty-two feet, the balance of the street not being in suitable condition for driving thereon. There was no evidence offered that the width of the crossings as heretofore maintained was not sufficient to accommodate the public.

We are of opinion that both the claimants and the public who desire to cross respondent's tracks are now afforded ample and reasonable means for so doing.

By the closing of First street entirely and closing of Third street to all vehicular travel the maximum inconvenience that can be caused to any of said property owners or any other person desiring to cross said two streets, is to compel them to travel one

block further, where they are permitted to pass underneath the tracks of the respondent instead of at a grade crossing. They are required to travel 330 feet further to the next street. They are, however, afforded the opportunity to travel upon Water street, as it is now paved instead of over said street in the condition in which it formerly existed.

It may be that the primary motive of respondent in making this improvement at great expense was to increase its facilities and improve its roadway. We cannot, however, overlook the fact that it has thereby abolished six grade crossings. It has been both the judicial and legislative policy of our State to abolish grade crossings. The Supreme Court has well said in *Mifflinville Bridge*, 206 Pa., p. 420:

“Any grade crossing which hereafter comes before the court, comes with a heavy burden of proof upon it.”

In *Ritter v. L. C. & N. Co.*, 16 D. R., 715, the court held that one who objects to the abolition of a grade crossing sustains an equal burden. And in *P. & L. R. R. Co. v. Lawrence County*, 198 Pa., p. 1, it was held that—No crossing will be permitted, except in case of manifest and unavoidable necessity.

The railroads are spending millions of dollars annually to abolish grade crossings, and our State and its municipalities are also appropriating large sums for the same purpose as well as to prevent the construction of others.

We are of opinion that the closing of First and Third streets to all vehicular travel, the narrowing of Second and Sixth streets and the construction of piers at the centre and curb lines of Fourth and Fifth streets did not cause any injury to any of the properties of claimants, in so far as access to the same is concerned; that there is now afforded to all of said properties, as well as to the general traveling public, ample, convenient and safe means of passing under the tracks of respondent in order to reach any particular point in Freeport. As to the question, however, of the effect of vacating and narrowing of, and the building of piers in certain streets upon the value of the property immediately adjacent thereto, on account of interference with light, air, etc., resulting therefrom, another question arises.

We have hereinbefore held that none of the claimants have any legal claim for damages sustained by them on account of injury to their several properties or buildings thereon, on account of the building by respondent of the cement walls on which its elevated tracks are constructed on its own right of way, in such close proximity to said properties as to interfere with light, air, etc., as well as to cut off or interfere with their access. Some of the properties have been damaged thereby but the owners are without legal remedy therefor.

We are of opinion that some of the claimants have sustained damages by reason of the entire or partial vacation of said streets. We find, however, that the only properties injured are those located immediately adjacent to respondent's right of way.

Upon due consideration of all the evidence relating to the claims for damages by owners of properties immediately adjacent to respondent's right of way, we are of opinion that in the following cases damages have been sustained by reason of the vacation, narrowing of or encroachment on said streets in the manner shown, in excess of any benefits accruing, in the following amounts:

<i>No.</i>	<i>Name.</i>	<i>Amount.</i>
1	Louther, Anna, Mary and Serepta,	\$295 00
2	Donnelly, Mary,	500 00
9	King, Edward and Elizabeth,	200 00
14	Reno, Joseph & E. M.,	200 00
17-A	McCoy, Leah,	250 00
17-B	McCoy, Leah,	250 00
20	Lacey, Josephine,	500 00
22	Mohr, M. C.,	1,000 00
23	Scheitle, Joseph,	200 00
24-A	Hosey, Margaret,	250 00
25	Shirley, Martha,	295 00
27	Hild, Henry Estate,	500 00
Total,		\$4,440 00

Fourth. Can the adjacent property owners claim damages by reason of the operation of respondent's road at its present eleva-

tion, on its own right of way, on account of any damages they may sustain from noise, dust, smoke, etc., arising therefrom?

This question, we hold, has been definitely and conclusively settled by the Supreme Court in the well considered cases of *P. R. R. v. Lippincott*, 116 Pa. 472, and *P. R. R. v. Marchant*, 119 Pa. 541, and which have since been often referred to and reaffirmed in later opinions. The conclusiveness of the Supreme Court's ruling in this respect renders any extended comment on our part unnecessary and in conformity with the law as therein expressed we conclude that none of claimants can be awarded any damages by reason of the location or construction of the cement walls by respondent on its own property, for the purpose of elevating its tracks, nor on account of the operation of its road thereon.

Fifth. In determining the damages, if any, that have accrued to the adjacent property owners on Water and Sixth streets, on account of raising the grade thereof, we must consider the benefits accruing to them by reason of said improvements and they should be allowed only such damages as are in excess of the benefits accruing. This renders it necessary to give due consideration to the conditions existing immediately prior to the change in grade in said streets as well as after. Prior to the making of said changes the evidence shows that Water street was a dirt road of indefinite width.

We cannot view the change made in Water street, on account of the improvements made thereon by respondent, in any other light than that it is a special benefit to all of the property immediately abutting thereon, as well as general benefit to the entire borough. As it is now curbed and paved it affords easy and convenient access, during all seasons of the year, to and from the abutting properties, as well as to the general traveling public.

It has been repeatedly held that where a municipality has made improvements in a street, and in so doing changed the grade thereof so as to injure an abutting property owner, such owner has a lawful claim against the municipality to the extent that such damage exceeds the benefits accruing, the rule to guide us in our conclusion being the market value of the property immediately prior to and after the making of the improvements. This rule

has been so well established by our courts that it is not necessary for us to cite authorities.

Some of claimants having property on Sixth and Water streets claim damages not only for the raising of the grade of those streets, but also for reasons which we have held do not entitle them to any damages.

Due consideration of all the evidence in relation to the claims of property owners on Sixth and Water streets for damages by reason of the change of grade therein, making due allowance for the benefits accruing, as well as the damages sustained on account thereof, that is to say, by considering the market value of these several properties, immediately before and after the making of the change of the grade in said streets, having led us to the conclusion that except in the cases of Numbers 7, Anna, Mary and Serepta Louther, 8A, Frank Maxler, trustee, and 28, Herman Tamuscheit, the benefits accruing to each of said properties by reason of the improvements made in Water and Sixth streets, are equal to or exceed in amount the damages, and all of said claims excepting the three noted are disallowed.

The three exceptions are awarded damages as follows:

<i>No.</i>	<i>Name.</i>	<i>Amount.</i>
7	Louther, Anna, Mary and Serepta,	\$1,700 00
8-A	Maxler, Frank, Trustee,	1,000 00
28	Tamuscheit, Herman,	900 00
Total,		\$3,600 00

The following is a summary of the several applications and the conclusion of the Commission in accordance with the foregoing report:

CLAIMS ALLOWED.

<i>No.</i>	<i>Name.</i>	<i>Amount.</i>
1	Louther, Anna, Mary and Serepta,	\$295 00
2	Donnelly, Mary,	500 00
9	King, Edward and Elizabeth,	200 00
14	Reno, Joseph and E. M.,	200 00
17-A	McCoy, Leah,	250 00
17-B	McCoy, Leah,	250 00

<i>No.</i>	<i>Name.</i>	<i>Amount.</i>
20	Lacey, Josephine,	\$500 00
22	Mohr, M. G.,	1,000 00
23	Scheitle, Joseph,	200 00
24-A	Hosey, Margaret,	250 00
25	Shirley, Martha,	295 00
27	Hild, Henry Estate,	500 00
Total,		\$4,440 00
7	Louther, Anna, Mary and Serepta,	1,700 00
8-A	Maxler, Frank, Trustee,	1,000 00
28	Tamuscheit, Herman,	900 00
Total,		\$3,600 00
Grand total,		\$8,040 00

ORDER.

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon the petition of certain claimants for damages arising from the construction of the improvements authorized by contract between the Borough of Freeport and The Pennsylvania Railroad Company, approved by this Commission at Municipal Contract Docket No. 179—1915, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission having on the date hereof filed of record its report containing its findings of fact and conclusions thereon.

Now, to-wit, June 3, 1919, the Commission finds and determines that the following property owners are entitled to compensation for damages arising from the construction involved in said contract in the amounts set opposite their respective names, as determined in the report of the Commission :

Anna, Mary and Serepta Louther,	\$295 00
Mary Donnelly,	500 00
Edward and Elizabeth King,	200 00
Joseph and E. M. Reno,	200 00
Leah McCoy,	250 00

Leah McCoy,	\$250 00
Josephine Lacey,	500 00
M. C. Mohr,	1,000 00
Joseph Scheitle,	200 00
Margaret Hosey,	250 00
Martha Shirley,	295 00
Henry Hild Estate,	500 00
Anna, Mary and Serepta Louthier,	1,700 00
Frank Maxler, Trustee,	1,000 00
Herman Tamuscheit,	900 00

and hereby directs and orders the Pennsylvania Railroad Company to pay said amounts to said claimants within thirty (30) days from the date of this order.

And it is Further Ordered, in accordance with said report that all other claims are disallowed and the petitions of the claimants, therefore, are hereby refused.

By the Commission,
WM. D. B. AINEY, *Chairman*.

ENOS H. HESS *v.* UNITED STATES RAILROAD ADMINISTRATION,
WALKER S. HINES, DIRECTOR GENERAL, AND PHILA. & READ-
ING RAILWAY CO., LESSEE OF PHILA., HARRISBURG & PGH.
R. R. Co.

*Railroads—Crossings—At grade—Abolition of—Construction of
new and more convenient highway desired.*

Section 12 of Article V of The Public Service Company Law, as amended by the Act of July 17, 1917, P. L. 1025, gives the Commission power to lay out, establish and open new public highways, or to abandon or vacate highways or portions of highways, in connection with the abolition, abandonment, relocation or reconstruction of an existing grade crossing, but these acts were not intended primarily to be used for the purposes of opening new and perhaps more convenient highways.

COMPLAINT DOCKET No. 2654.

Enos H. Hess, for complainant.

John C. Brady, for respondent.

W. L. Kinter, for U. S. Railroad Administration.

Report and Order of the Commission.

BY THE COMMISSION :

The complaint in this case alleged that the crossing at grade of the tracks of the Philadelphia, Harrisburg and Pittsburgh Railroad Company, leased to and operated by the Philadelphia and Reading Railway Company, across the public highway in the village of Grantham, Cumberland County, leading from said village to the Borough of Dillsburg and the city of York, York County, was dangerous to the traveling public and the abolition thereof necessary and proper for the accommodation, convenience and safety of the public.

At the hearing it developed that what was really desired was not the elimination of the crossing in question, but the construction of a new public highway and an overhead crossing at a point about 1,200 feet east of the existing crossing, so as to provide a means of access to the Messiah Bible School, located on the south side of the railroad and practically isolated save for a private right of way, at grade, over the tracks of the railroad company.

Section 12 of Article V of the Act of July 26, 1913, P. L. 1374, known as "The Public Service Company Law," as amended by the Act of July 17, 1917, P. L. 1025, gives the Commission power to lay out, establish and open new public highways, or to abandon or vacate highways, or portions of highways, in connection with the abolition, abandonment, relocation or reconstruction of an existing grade crossing, but these acts were not intended primarily to be used for the purpose of opening new and perhaps more convenient highways, nor for such purposes, can we find legal reasons upon which to support an affirmative order merely because a new crossing would, as an incident, be established. This complaint rests upon the desire of the complainant to secure a more accessible highway to property in which he is interested. All the arguments advanced before us might, with propriety, be addressed to another forum. It is sufficient to state that the testimony does not disclose a situation to which the acts referred to could properly apply or which would warrant this Commission in sustaining the complaint.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to-wit, June 9, 1919, It is ordered: That the complaint in this case be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

APPLICATION OF STEVENS COAL COMPANY.

Tramway—Grade crossings—Application for approval of construction of—Applicant not a public service company—No jurisdiction in Commission to grant approval sought.

APPLICATION DOCKET No. 2540—1919.

Howard Zacharias, for applicant.

Maffett & Rimer, for protestant.

Report and Order of the Commission.

BY THE COMMISSION:

The Stevens Coal Company, unincorporated, engaged in the business of mining coal, in the present application seeks the Commission's approval of the construction, operation and maintenance of two crossings at grade of public highways in Perry Township, Clarion County, at points where a narrow gauge tramroad of said coal company crosses said public highways. A protest was filed by the Supervisors of Perry Township, which protest, among other things, raised the question of the jurisdiction of the Commission in the premises, in that the applicant is not a

public service company and not engaged in any way in furnishing service to the public within the purview of the Public Service Company Law, and the tramroad will be used solely in the mining operations and business of the applicant.

This application falls within the scope of the ruling of the Commission in the application of Reichley Brothers & Company (Application Docket No. 211—1915) and for the reasons set forth in the opinion in that case we find and determine that this application should be dismissed for lack of jurisdiction. An order will issue in accordance with this determination.

ORDER.

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon petition and protest on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof.

Now, to-wit, June 30, 1919, It is ordered: That the prayer of the petition for a certificate of public convenience in this proceeding be and the same is hereby refused and the application dismissed.

By the Commission,
WM. D. B. AINEY, *Chairman.*

APPLICATION OF THE BOROUGH OF PUNXSUTAWNEY.

Municipal water works—Application for approval of construction of—Existing companies serving community.

The Borough of Punxsutawney applied to the Commission for approval of the construction of a municipal water works system. It appeared that the borough was already being served, though in an entirely unsatisfactory manner, by two existing companies. The Commission refused the application but instituted proceedings to alleviate the conditions complained of by the applicant.

APPLICATION DOCKET No. 186—1915

W. M. Gillespie, J. W. Gillespie and Lex N. Mitchell, for applicant.

John W. Reed, H. H. Mercer, C. Z. Gordan, W. B. Adams, Charles Margiotti, and D. H. McIntyre, for protestants.

Edward W. Biddle, for Bondholders' Protective Committee.

Arthur R. Rupley and Ralph J. Baker, for certain interests.

Report and Order of the Commission.

RILLING, Commissioner :

The Borough of Punxsutawney filed an application for approval by the Commission of its right to construct a municipal water plant, according to plans and specifications therein set forth, at an estimated cost of \$130,000.00. It also alleged that the Punxsutawney Water Company and Lindsay Water Company, the two companies serving Punxsutawney, were rendering inadequate service at excessive rates and supplying the public with impure water. The answer of the two companies makes denial of the complaints as made, objects to the granting of the application and alleges that the applicant borough could not, on account of its limited borrowing capacity, provide sufficient funds to construct a municipal plant. Hearings were held and a large amount of testimony taken. An engineering conference to consist of engineers representing the water companies and the borough and to be presided over by a member of the Engineering Bureau of the Commission, was agreed upon and made an extensive report in detail of all matters concerning the proposed municipal, as well as the two existing plants.

The following are, in a general way, the facts shown :

The Punxsutawney Water Company was incorporated to serve the borough of Punxsutawney, has outstanding 1,202 shares of capital stock of \$25.00 each, of which 805 shares are owned by the Lindsay Water Company. It has no bonded indebtedness but had on March 1, 1919, a floating indebtedness of about \$30,000, with deferred interest thereon. The Punxsutawney Water Company has guaranteed \$200,000 of bonds issued by the Big

Run Water Company, as well as about \$200,000 of the bonds of the Lindsay Water Company.

The Lindsay Water Company, organized to serve the Borough of Claysville, which is now incorporated into and made a part of Punxsutawney, has a capital stock of \$200,000, first mortgage bonds of \$51,000, due April 1, 1919, upon which there is unpaid about \$30,000 interest; and another bond issue of \$300,000, on which there is a large amount of unpaid interest. The 805 shares of the capital stock of the Punxsutawney company owned by it have been pledged as security for its bonds.

The Big Run Water Company, incorporated for \$5,000 to serve the Borough of Big Run, has no assets save a lot worth about \$150. It has outstanding bonds for \$200,000, which are guaranteed by the Punxsutawney Water Company. The Borough of Big Run, about seven miles northeast of Punxsutawney, is served by the Lindsay Water Company without any charter right so to do.

About two years ago, the Court of Common Pleas of Jefferson County appointed receivers for the Punxsutawney Water Company, and the United States Court for the Western District of Pennsylvania, at about the same time, appointed receivers for the Lindsay Water Company. Proceedings have been commenced to foreclose the mortgage of the Lindsay Water Company and the same are now pending. The receivers of the two companies have expended about \$50,000 to improve their service. A Bondholders' Committee has been organized and represents a very large majority of the bonds of the Lindsay Water Company and the Big Run Water Company.

The service in Punxsutawney has been inadequate, especially its fire service. The Lindsay Water Company has a water supply on Clover Run about twelve miles from Punxsutawney, from which a large main extends to Punxsutawney and by which it serves Big Run Borough. The Punxsutawney Water Company purchases its water supply from the Lindsay Water Company. From the engineering report it appears that the proposed municipal plant, as described in the application, to be erected at an estimated cost of about \$130,000, would be inadequate, and to construct a proper municipal plant would cost in the neighborhood of \$400,000. The reproduction cost new of the Lindsay and

Punxsutawney Water Companies, as made by said conference, was about \$400,000, from which amount should be deducted a proper sum for depreciation.

The engineers representing the two water companies estimated it would require an outlay of about \$100,000 to make necessary repairs and improvements to render adequate service. The engineers representing the borough estimated that the cost for that purpose would be over \$275,000. The original cost of the physical property of the Punxsutawney Water Company was about \$125,000, and of the Lindsay Water Company about \$200,000, as ascertained by the companies' accountants.

In the year 1918, the gross receipts of the Punxsutawney Water Company were \$38,036.28, and the cost of operation, including payment of its water supply, was \$41,407.21. The gross receipts of the Lindsay Water Company for the same year were \$26,298, and its operating cost \$20,002.00. The borough offered to pay for the two existing plants in their present condition, \$184,000, which sum the companies refused to accept. The service rendered by the two companies at the present time has been somewhat improved, but is still inadequate, and needed improvements thereto should be made at once.

The applicant borough has at the present time, under its constitutional seven per cent. borrowing capacity, a very narrow margin on which to issue bonds, much less than is necessary to provide funds needed to erect a proper new municipal plant. Its authorities, however, state that it desires to issue bonds under the constitutional amendment of 1917, which are to be a lien only upon the new plant and therefore can be issued beyond the seven per cent. limitation.

That the public in Punxsutawney have in the past been much imposed upon by the two water companies serving them cannot be gainsaid, and by now seeking relief through the construction of a municipal plant is only what may naturally be expected under the circumstances. The two public utilities have wholly failed to perform the duty imposed on them by law, and as a sequence are now confronted with the pending application.

It is reasonable to expect that, under the foreclosure procedure and sale of the property, a reorganization of the two companies will be effected whereby improved service will be

rendered to the borough. If it does ~~not so result the Borough of~~ Punxsutawney may apply to this Commission for ~~leave to acquire~~ the existing plants, if it so desires.

Our conclusion is that the present application for the construction of a municipal plant by the borough be refused. The Commission, on its own motion, hereby institutes a new proceeding for the purpose of inquiring into the rates and service of the two existing companies, in which proceedings so much of the evidence as was adduced in the present application, as it deems necessary, will be introduced. A hearing, of which the parties shall have due notice, will be fixed, at which hearing both the applicant borough and the two water companies may offer such additional testimony as they may deem proper. At the conclusion of the hearing the Commission will make such order as to it may seem just to provide proper service to applicant, and compel the two companies to perform the duty required of them by law. The attention of the two companies is hereby called to the fact that it is important that certain improvements be made at once to their plants, in order to insure permanent, adequate service, and which may be undertaken prior to the final order being made by the Commission, subject to the approval of the Engineering Bureau of the Commission. The Commission will, in its final order, determine what if any further improvements or extensions are necessary.

Commissioner Reed did not participate in the discussion or action of the Commission in this proceeding.

ORDER.

This matter being before The Public Service Commission of the Commonwealth of Pennsylvania upon petition and protests on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof :

Now, to-wit, June 17, 1919, It is ordered: That the prayer of the petition in the above entitled proceedings for a certificate of

public convenience be and the same is hereby refused and the application dismissed.

By the Commission,
WM. D. B. AINEY, *Chairman*.

H. W. SPENCER AND G. W. SCHRIER *v.* WAVERLY, SAYRE AND
ATHENS TRACTION CO.

Rates—Increase of—Alleged excessive and unreasonable—Franchise ordinances.

Complaint was made that the increased fares of the respondent were excessive and unreasonable as well as in violation of certain franchise ordinances granting permission to the respondent to use the streets of the municipalities involved.

At the hearing held by the Commission it was shown that the revenues obtained from the increased fares were not sufficient to pay operating costs and provide a fund for the maintenance of the property in a good condition to render adequate public service. The stockholders have never received any dividends on their stock and the president of the company, who owns twenty-four per cent. of the bonds, has yearly cancelled his coupons without payment and turned them into the treasury of the company because of the lack of revenues to pay them. The testimony offered by the respondent was not controverted by the complainants.

Consequently, the Commission dismissed the complaint so far as it related to excessive fares, with leave to renew the same after January 1, 1920, if deemed advisable.

So far as the complaint related to the lack of jurisdiction in the Commission to sanction rates of fare in excess of those contained in certain municipal consent ordinances, the Commission, following its own decisions and the Supreme Court in *Leiper v. R. R. Co.*, 262 Pa. 328, alleged that such rates must give way to those found by it to be reasonable and dismissed the complaint.

COMPLAINT DOCKET NOS. 1990 AND 2375.

Report and Order of the Commission.

C. E. Mills and E. M. Dunham, for complainants.

Thomas O'Connor, for respondents.

AINEY, Chairman, July 14, 1919:

The respondent by its filed tariff which became effective April 7, 1918, increased its rate per fare zone from five to six cents. The complainants on April 3, 1918, filed with this Commission a petition (Complaint Docket No. 1990) averring that the proposed rates were unjust, improper, unnecessary, burdensome to the public and against the positive and express contract under which respondent obtained the consent of the Boroughs of Sayre, Athens and South Waverly to construct its road within each of the said boroughs. The answer which was submitted by respondent questioned the status of these complainants and averred that they were without legal right in bringing the complaints at least in so far as these complaints were founded upon municipal contracts or ordinances limiting the rate of fare to be charged. At the hearing on July 24, 1918, no testimony was offered, but the complainants' counsel stated that they intended to rely entirely on the inviolability of the municipal contracts mentioned in the complaints.

Subsequently to this hearing, the respondent under filed tariff which became effective October 13, 1918, made a further increase of fare from six cents to seven cents per zone, and this was followed by a complaint filed September 2, 1918, (Complaint Docket No. 2375), in which the reasons set forth in the prior complaint were reasserted, and in addition it was averred that the increase is "not necessary to enable respondent to earn proper and just compensation for services performed by it."

To the second complaint, the respondent filed an answer containing substantially the same averments as it had theretofore presented. With these two complaints before it, the Commission, with the assent of parties, consolidated the further proceedings, and on March 20, 1919, a final hearing was had at which testimony was presented by respondent, covering a description of its property, its capitalization, revenues and expenses of operation, together with some comparison between the former and the then costs of labor and power. The only evidence submitted by complainants was with respect to and with copies of the municipal ordinances granting consent to lay tracks and limiting rates of fare. The evidence of respondent as to increased costs of operation was not controverted or questioned. It appears from the tes-

timony that the respondent's lines in Pennsylvania extend through the Borough of South Waverly, adjacent to the incorporated village of Waverly, N. Y., to and through the Borough of Sayre and through portions of the Borough of Athens. In addition to its intrastate service, the respondent is engaged in interstate traffic, its lines extending into the village of Waverly, N. Y. The population of the municipalities which it served in the year 1910 was 16,161 of which 4,855 were in Waverly, N. Y., and the remainder in Pennsylvania. The respondent operates in three divisions commonly designated the Belt Line, the South Waverly Branch and the Main Line. The Belt Line comprises 3.3 miles of track located wholly in Waverly, N. Y. The South Waverly Branch extends from the business section of Waverly, N. Y., in a westerly direction for about 1,200 feet along Broad street on the tracks of the Belt Line to Elmira road, thence south across the state line into Pennsylvania, through South Waverly and Sayre where it joins the Main Line at Elmer avenue. The Main Line extends easterly on Broad street, Waverly, N. Y., for about 800 feet on the same tracks as the Belt Line, turning south across the state line at Cayuta avenue, and passing through Sayre and Athens, Pennsylvania. The total length of tracks, including sidings, is 11.92 miles of which 8.62 miles are in Pennsylvania. All electric power is purchased by respondent from the Sayre Electric Company. It has in service five double truck and eight single truck closed cars and eight single truck open cars, and also two work cars. At the close of 1917, it had fifty-eight employees to whom salaries and wages were paid in that year in the aggregate of \$43,902.34.

The respondent has sold nontransferable commutation tickets for use between the hours of 5:30 and 7:30 a. m., and 5:00 and 7:00 p. m., the number of rides varying with the basic fare, to wit, under five-cent fare, forty-four tickets, under six-cent fare, thirty-eight tickets, under seven-cent fare, thirty-four tickets for \$2.00. Also under six-cent fare, seventeen tickets, and under seven-cent fare, fifteen tickets for \$1.00 were sold, good at all hours. It appeared that the respondent had obtained the necessary approval of the Interstate Commerce Commission before increasing its fares on interstate traffic, and the New York Commission by opinion and order of January 31, 1918, permitted the

respondent to impose a six-cent rate on intrastate carriage in that state.

The complaints having been filed in each instance before the effective dates of the increased rates, the burden rested under the law upon respondent to justify them, and therefore the duty devolves upon this Commission to determine whether respondent has met the requirements of the law in that respect, and whether the increased rates are just and reasonable.

At the time the first complaint was filed, this Commission had not reached a conclusion with respect to the effect of municipal consent ordinances prescribing or limiting rates, but since then, in the case of *Wilkinsburg v. Pittsburgh Railways Company*, P. U. R. 1918 F, 131, (6 P. C. R. 281), and *Harbor Creek v. Traction Company*, P. U. R. 1918 F, 164, (6 P. C. R. 520) we have held that such ordinances do not prevent the Commission from inquiring into and determining from time to time what are the just and reasonable rates which may be imposed by carriers and to be paid by the public. These decisions of the Commission, in so far as they dealt with the question of inviolability of contracts under the constitution, appear to have been settled by the Supreme Court in *Leiper v. Railroad Company*, 262 Pa. 328, and no further discussion thereof is necessary.

As to the reasonableness of the rates under attack, testimony was offered by respondent showing the very large increases in cost of labor and material required in the operation of its road and in the maintenance of its service. While respondent's operating revenues had increased from \$17,215 in 1910 to \$101,568.37 in 1918, its operating expenses also increased from \$59,214. In 1910 to \$87,386.73 to which latter amount should be added \$7,270.96 for power based on coal clause in power rate, making the total operating cost \$94,657.69 in 1918. Taxes had also increased over the same period from \$2,081.00 to \$3,600.00 which latter sum must be added to the operating expenses, and when this total is deducted from the company's income it would leave but \$3,310.68 with which to care for depreciation in order to keep its property in good condition for public service and to pay a fair return to the stockholders on their investments including therein interest on outstanding capital obligations.

A more critical analysis of the testimony shows for the fiscal year of 1917 an increase in operating revenues of \$1,349.00 as against an increase in operating expenses of \$6,320.00; for the fiscal year of 1918 an increase in revenues of \$396.00, and an increase in expenses of \$14,489.00. A comparison of results by calendar in place of fiscal years shows an increase in revenues for 1918 over 1917 of \$90.00, and an increase in operating expenses of \$15,881.00. This showing is the direct result of the increased operating expenses because of labor and material and occurred, notwithstanding the six-cent and seven-cent fares were in effect. It should be noted that the increase to six cents per zone became effective as to interstate and Pennsylvania traffic on April 7, 1918, and on New York state traffic on June 1, 1918; the seven-cent fare became effective in Pennsylvania and on interstate traffic on October 13, 1918. The greater part of respondent's traffic was carried under the increased fares in effect for the greater part of 1918, notwithstanding which the passenger revenues were increased over the preceding year by only \$90.00. During the calendar year of 1918, the passenger fares collected numbered 1,741,556, a decrease from the preceding twelve months of 208,181. More than half of this decrease, to wit, 106,928 occurred during the last quarter of 1918 and was no doubt influenced to considerable extent by the influenza epidemic which seriously affected the volume of passenger traffic throughout the state. The respondent has outstanding capital stock \$200,000.00; first mortgage, six per cent. bonds, \$150,000.00; first consolidated mortgage bonds, \$310,000.00; total \$660,000.00. No dividends have ever been paid on stock. The gross income has since 1910 not been sufficient in any one year to meet the company's interest obligations. A corporate surplus of \$30,836.00 which existed in 1910 had entirely disappeared by 1915, and since that year a deficit has yearly accumulated which in 1918 alone amounted to \$29,432.00. No valuation of respondent's property was made or submitted, and for the purpose of this case, under the foregoing facts, we do not consider one necessary. Spreading the bond issues \$460,000.00 over the twelve miles of road which the respondent operates, it would approximate \$38,500.00 per mile, apparently not an excessive amount for the character of construction. The testimony shows that the president of the respondent

corporation is the owner of about twenty-four per cent. of the bonds, and since 1910 it has been the custom of this bondholder to cancel his interest coupons and turn them into the treasury of the company. In January, 1919, the Public Service Commission of New York investigated and authorized a six-cent fare in Waverly, N. Y. The calculations in that investigation were based primarily upon the revenues for the period covering July to November, 1917, and the year 1916. That Commission based the revenues attributable to interstate traffic upon the number of transfers issued, and the transfers were issued in one direction only. A large portion of respondent's business consisted of carrying passengers between Waverly, N. Y. and the car shops at Sayre, Pennsylvania. An estimate for the average interstate trip of 8,900 feet was determined upon, of which 6,000 feet were in Waverly, N. Y. By the application of this distance basis approximately two-thirds of the interstate revenue was allotted to New York state business. By a further estimate of the portion of the expenses, it was determined that the Belt Line showed a deficit of \$3,156.94, the receipts including the proportion of the interstate business having been but \$6,216.43. Our review of the figures in the report of the New York Commission leads us to the conclusion that the estimate of the interstate revenue was based on the traffic in one direction only, and that the estimated revenue should have been shown as \$8,396.11, and the operating deficit as \$977.26. In reaching its conclusion, the New York Commission considered the operating results for the entire system for a number of years.

Applying to the traffic for 1918 (apportionment estimated on the same basis as used by the New York State Commission) the respective fare increases over the five-cent fare for the periods in which they were in effect shows a total amount of the increase as \$17,693.00 of which \$1,202.00 would accrue to New York traffic and \$16,491.00 to Pennsylvania traffic (interstate traffic proportioned). In view of the New York line having twenty-seven per cent. of the track and thirty per cent. of the aggregate population served and producing eight per cent. of the total number of passengers, it does not appear that six per cent. of the increase in fares is the proper portion which it ought to produce. On a trackage basis New York produced \$365.00 per mile, and

Pennsylvania \$1,913.00 per mile which reduced to a proper basis for comparison by considering the difference in the number of passengers carried, shows a greater return from Pennsylvania traffic by \$516.00 per mile. We were not furnished with car mile data, and the result of comparisons and proportions might be changed to a certain extent with such information before us, but it could not affect the final conclusion reached with respect to the inadequacy of respondent's revenues or the reasonableness of the imposed rates of fare. Were the New York intrastate rate increased to seven cents, it would, in view of the small volume of purely intrastate travel therein, not materially increase the gross revenues of the company, nor affect the result in this case.

To expect public service of these carriers without permitting them sufficient revenues to produce it, is as fallacious an economic suggestion as to demand bricks without straw or to require faithful toil from the muzzled ox.

It is therefore a matter of ordinary business prudence and sagacity that the public generally should come to an appreciative understanding of what that service means to the industrial and commercial life of the state, and to each locality within it and to recognize that the terms upon which it can be continued for their use and enjoyment are that it shall receive at their hands as rate-payers revenues sufficient to furnish it.

If the public are to be adequately served, railways must be permitted to earn out of imposed rates of fare revenues large enough in amount to pay operating costs, a fair return and provide for the maintenance of the property, provided always that the rates imposed are not unjust or unreasonable.

The respondent's objection that the complainants were not proper parties, at least in so far as they relied upon municipal ordinances, we do not think tenable. Article VI, Section 6 of the Public Service Company Law, is very broad and explicit.

We will direct the respondent to make monthly reports to the Commission of its passenger revenues, operating expenses and the number of passengers carried during the remainder of the current year, and to file with the Commission a statement covering similar information for the portion of the current year which has passed. The complaints will be dismissed, but with leave to renew same after January 1, 1920, and the Commission will re-

tain jurisdiction for the purpose of making such modification in its report and order as may be warranted in the light of the respondent's experience during the intervening time.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties and due consideration of the matters and things involved having been had, and the Commission having on the date hereof made and filed a report containing its findings of fact and conclusion thereon, which said report is hereby approved and made part hereof;

Now, to wit, July 14, 1919, it is ordered: That the complaint in these cases be and the same are hereby dismissed with leave to complainants to renew same after January 1, 1920, and

It is further ordered, that the respondent make and file with the Commission monthly reports setting forth its passenger revenues, operating expenses and the number of passengers carried during the remainder of the current year and also file with the Commission a statement covering similar information for the portion of the current year which has passed. The Commission will retain jurisdiction for the purpose of making such modification in its report and order as may be warranted in the light of the respondent's experience during the intervening time.

CITY OF LEBANON *v.* LEBANON GAS & FUEL COMPANY.

*Gas companies—Rates—Service charge—Alleged to be excessive
—Service—Inadequate pressure.*

The complaint alleged that the increased rates of the respondent, including a service charge of fifty cents per month, were excessive and that the pressure in the mains was inadequate.

The Commission held that the pressure was ample, the rates reasonable and dismissed the complaint.

COMPLAINT DOCKET NO. 1709.

Warren G. Light, City Solicitor, for complainant.

Frank H. Lehman and *Harry J. Schools*, for intervening petitioners.

Grant Weidman and *J. E. B. Cunningham*, for respondent.

Report and Order of the Commission.

BY THE COMMISSION:

The respondent, the Lebanon Gas and Fuel Company, filed with this Commission, effective September 29, 1917, a schedule of increased rates including a service charge of fifty cents per month.

The City of Lebanon filed a complaint against such increased rates on September 24, 1917, also alleging that the pressure of respondent's supply in the City of Lebanon was inadequate on account of its supplying territory outside of the city limits. No evidence was offered by the complainant in support of its complaint. The burden of sustaining the reasonableness of the new schedule of rates is upon the respondent, and at the hearings it furnished a large amount of testimony to the effect that its operating costs had materially increased. Evidence was also furnished as to its indebtedness and stock issues.

From the evidence it appears and we so find, that the supplying of gas by the respondent to territory outside of the city limits of the City of Lebanon does not influence the pressure of respondent's supply within the city, and that the pressure of respondent in the City of Lebanon is adequate.

The report of this Commission in the complaint of Lewistown Gas Company v. Penn Central Light, Heat and Power Company, 7 Pa. Corp. Rep. 97, upholds the right of a utility such as respondent to include in its schedule of rates a reasonable monthly service charge, and the charge of fifty cents per month for that purpose contained in the respondent's new schedule of rates cannot be considered excessive.

From the evidence in this case it appears that after the payment of all operating expenses and maintenance charges, not including, however, any items for interest or dividends, there remained for respondent to pay a return upon its investments the following sums:

Year ending September 30, 1916,	\$9,427 00
Year ending September 30, 1917,	463 00
Year ending September 30, 1918,	2,862 00

It should be noted that the earnings for 1918 were under the increased schedule of rates.

There is no evidence to indicate that the operating expenses paid by the respondent during the years 1916, 1917 and 1918 were either excessive or unwarranted. Under the foregoing statement of earnings, no useful purpose would be served by requiring respondent to make a valuation of its plant in order that the Commission may reach a conclusion as to the extent of return respondent would have a right to earn. It is apparent from the showing made that the new schedule of rates as filed by respondent will not produce more revenue than it is entitled to receive and the complaint in this case will therefore be dismissed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to-wit, June 17, 1919, It is ordered: That the complaint in this case be and the same is hereby dismissed.

By the Commission,
WM. D. B. AINEY, *Chairman.*

J. J. MORLEY, ET AL. v. WILLIAM G. McADOO, DIRECTOR GENERAL,
LEHIGH VALLEY RAILROAD COMPANY, AND SUSQUEHANNA
& NEW YORK R. R. CO.

*Railroads—Intrastate rates—Power of Commission to fix same
during period of Federal control.*

In view of the recent decision of the United States Supreme Court, the Public Service Commission is without authority to inquire into and regulate intrastate rates while the railroads are being operated by the Director General, under authority of the Act of Congress.

COMPLAINT DOCKET No. 2623.

E. P. Young, for complainant.

BY THE COMMISSION:

The complaint relates to rates on bituminous coal from Weston, Pennsylvania, to Towanda, and it is specified that to the imposed rate of ninety cents per ton from Weston, Pennsylvania, to local points on the Susquehanna and New York Railroad, in the Borough of Towanda, is added a charge of thirty cents per ton when cars are set over on Lehigh Valley Railroad Company's switches in the same municipality. This is alleged to be excessive. By way of comparison, it is alleged that on carloads of wood or lumber but \$1.00 per car is imposed for such switching service. The railroad companies filed answers that their roads were being operated by the Director General of Railroads, under authority of the Act of Congress commonly referred to as the Federal Control Act.

In view of the recent decision of the United States Supreme Court sustaining the authority of the President, acting through the Director General of Railroads, to initiate intra-state rates, it would serve no useful purpose to discuss the merits of the complaint.

Being without authority to inquire into and regulate intra-state rates while these railroads are being operated by the Director General, under the authority of the Act of Congress mentioned, the complaint must be dismissed.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to-wit, June 9, 1919, It is ordered: That the complaint in this case be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

LEHIGH NAVIGATION ELECTRIC CO. *v.* LEHIGH & NEW ENGLAND
R. R. Co.

Railroads—Rates—Increase of without consent of the Commission—Commission without power to grant relief during period of Federal control.

In view of the recent decision of the United States Supreme Court, in the case of Northern Pacific Railway Company, et al. vs. the State of North Dakota, et al., 7 P. C. R. 433, rates inaugurated by the President of the United States, through the Director General of Railroads, are valid and legal rates during the period of Federal control, and the Commission, is, while the railroads are operated under the authority of the Act of Congress, without power to inquire into and determine the reasonableness of the rates so imposed.

COMPLAINT DOCKET No. 2666.

Report and Order of the Commission.

William N. Trinkle, for complainant.

William Jay Turner, for respondent.

BY THE COMMISSION:

The Lehigh and New England Railroad Company, by tariff P. S. C. Pa. No. 451, filed with the Public Service Commission of the Commonwealth of Pennsylvania, put into effect on May 28,

1915, a rate of eighteen cents per gross ton of 2,240 pounds as applicable to transportation of coal from Coaldale, Hauto (storage yards), Lansford, Nesquehoning, Seek and Tamaqua, Pa., to the power house of the complainant at Hauto, Pa. This rate continued in force until June 2, 1918, when a new tariff was filed, effective in thirty days, increasing the rate to twenty-two cents per gross ton, which continued in effect until June 25, 1918, when the said respondent charged, exacted and collected from the complainant a rate of fifty cents per gross ton for transportation between the points above mentioned. This rate was initiated by the President of the United States through the Director General, United States Railroad Administration, but was not filed with the Public Service Commission, as the complainant's claim is required to be done by Article II, Section 1(c) of the Act of July 26, 1913. The complainant alleges that the said rate of fifty cents is not a lawful rate and that the respondent has no right to charge and collect the same and is only entitled to collect the rate filed with the Public Service Commission of the State of Pennsylvania, namely twenty-two cents per gross ton. The respondent, in answer to the complaint, alleges that on December 28, 1917, the President of the United States, through the United States Railroad Administration, took exclusive possession and control of, and has since operated, the railroad; that the rate complained of was initiated by the President of the United States through the Director General of Railroads, United States Railroad Administration, by virtue of the powers conferred upon him in the Federal Control Act, and that the said tariff was filed on one day's notice with the Interstate Commerce Commission, effective June 25, 1918, under General Order No. 28 of the Director General of Railroads, United States Railroad Administration, dated May 25, 1918, as amended June 12, 1918, and that a copy of said tariff was filed with this Commission on or about June 24, 1918. It alleges that the tariff complained of was not established by or on behalf of it and that it has no part in the charging and collecting of the rates therein specified.

In the recent decision of the United States Supreme Court in Northern Pacific Railway Company, et al. v. the State of North Dakota, et al., it was held that the President, through the Director General of Railroads, had the right to initiate intrastate rates and

was only required to file the rates so established with the Interstate Commerce Commission, and was not required to comply with the regulations or laws of the various states or the public service commissions therein in reference to the filing of tariffs or fixing of rates. In view of this decision the rates inaugurated by the President of the United States through the Director General of Railroads are valid and legal rates during the period of Federal control, and we are, while the railroads are operated under the authority of the Act of Congress referred to, without power to inquire into and determine the reasonableness of the rates so imposed. The complaint, therefore, will be dismissed and an order will be entered accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to-wit, June 17, 1919, It is ordered: That the complaint in this case be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman.*

BOROUGH OF MT. HOLLY SPRINGS v. M. E. KRAYBILL LIGHT,
HEAT AND POWER COMPANY.

Electric companies—Service—Inadequate for commercial and industrial purposes—Failure to light streets of complainant borough.

Complaint was made that the respondent had failed to comply with a prior order of the Commission relating to service and that said service was entirely inadequate for commercial and industrial purposes. It was

also shown that the complainant borough was entirely without street lighting service.

The respondent made answer that its plant had been destroyed by fire and that a new plant was in process of construction.

The Commission ordered that new plant be put in operation not later than September 1, 1919, and that a competent man be employed to maintain and operate said plant.

COMPLAINT DOCKET No. 1818.

Report and Order of the Commission.

Herman Berg, for complainant.

M. E. Kraybill, for respondent.

SHELBY, Commissioner, July 15, 1919:

Upon the complaint of the Borough of Mt. Holly Springs v. M. E. Kraybill Light, Heat & Power Company, a public service company supplying electric current in Mt. Holly Springs and vicinity for street lighting, commercial and domestic purposes, this Commission filed the following order:

"Now, to wit, April 1, 1918, the complainant, the Borough of Mt. Holly Springs, is directed to pay and satisfy the bills of the respondent for which it is delinquent the sum of three hundred fifty-three and 38/100 dollars (\$353.38) and it is further ordered that the respondent, M. E. Kraybill Light, Heat and Power Company furnish and supply the full service provided in its contract with the Borough of Mt. Holly Springs within thirty days from the date of the service of this order."

On August 13, 1918, the complainant notified the Commission that the order of April 1, 1918, had been disregarded by the respondent and that the street lighting service was no better than before the order and that the commercial and industrial service was worse than ever and asked for immediate relief.

A further hearing was had and the complainant showed by competent testimony that the Borough of Mt. Holly Springs was entirely without street lighting service and that the service for commercial and industrial purposes was very inadequate. The respondent admitted this and explained the trouble was caused

by the destruction of one of its plants on March 15, 1919; that it was rebuilding this plant and hoped to have it completed and in operation by August 15, 1919, and that as soon as this was accomplished it would have sufficient current to supply all its patrons.

The testimony further shows that the respondent has not had a competent man in its employ for some time to properly operate the plant and make repairs to the apparatus, lines, services, etc. The Commission is of the opinion that the respondent should replace the plant destroyed by fire and have the same in operation on or before September 1, 1919, and on or before August 15, 1919, to employ and retain in its employ a competent man to maintain and operate its plant in such manner as to render adequate and satisfactory service.

An order will be made accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof filed of record a report containing its findings of fact and conclusions thereon which report is hereby approved and made a part hereof.

Now, to wit, July 15, 1919, it is ordered:

1. That the respondent, M. E. Kraybill Light, Heat and Power Company rebuild the plant destroyed by fire, and have the same in operation on or before September 1, 1919:

2. That the respondent on or before August 15, 1919, employ and retain in its employ a competent man to maintain and operate its plant.

APPLICATION OF THE TYLERSBURG HOME GAS COMPANY.

*Gas companies—Permission granted to discontinue public service
—Court decree necessary.*

The Commission permitted the Tylersburg Home Gas Company to cease and desist from furnishing the public service covered by the charter, if, and when, the Court of Common Pleas, Clarion County, renders a final decree dissolving the corporation.

APPLICATION DOCKET No. 2501—1919.

Maffett & Rimer, J. E. B. Cunningham, for applicant.

Report and Order of the Commission.

BY THE COMMISSION:

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon petition of the Tylersburg Home Gas Company and having been duly heard and submitted by the parties (due notice of the hearing having been given to all parties in interest by publication and no protest filed) and full investigation of the matters and things involved having been had, and it appearing from the testimony that the gas fields of the said company fail to furnish a supply of gas adequate and sufficient to carry out the purposes for which the company was incorporated; that the company is unable to secure by purchase or otherwise an adequate supply of gas; that for years past it has been operating at a loss; and it further appearing that a petition has been filed by the said company in the Court of Common Pleas of Clarion County for the dissolution of its charter:

Now, to-wit, June 16, 1919, It is ordered: That permission be and the same is hereby granted to the Tylersburg Home Gas Company to cease and desist from furnishing the public service covered by its charter if, and when, the Court of Common Pleas of Clarion County shall enter a final decree dissolving said corporation.

By the Commission,
WM. D. B. AINEY, *Chairman.*

NICK BILUSICH v. UNITED NATURAL GAS COMPANY.

*Gas companies—Service—Connections—Refusal to make same—
No charter obligation—Connections made for other parties.*

The complaint alleged that the respondent refused to make a connection from its mains to the premises of the complainant in Farrell, Mercer County. The refusal was based upon inability to secure labor and materials, and upon the orders of the United States Fuel Administration forbidding the making of new connections. It was also denied that the respondent was under any charter obligation to serve the public in the territory in question.

It appeared that the orders of the United States Fuel Administration had been rescinded, and that the respondent had made several new connections for other parties since the filing of the complaint. The Commission, finding that the respondent was actually serving the public in Farrell, refused to exempt it from regulation for lack of charter rights and ordered the connection made.

COMPLAINT DOCKET No. 2591.

Benjamin Jarrett, for complainant.

William M. Parker and *J. B. Frampton*, for respondent.

Report and Order of the Commission.

BY THE COMMISSION:

Respondent, a natural gas company, was organized under the Act of 1895, with charter rights to serve the Borough of Sharon, Mercer County, Pennsylvania, in which it has been rendering service for more than twenty years. It also served the adjacent territory, increasing its service with the growth of the locality. The borough of Farrell was organized from this adjacent territory. While Farrell Borough has never, by ordinance, granted to respondent the right to render its public service, it has regulated the facilities of respondent. Respondent's mains extend from Sharon into Farrell and are so connected as to constitute one general system.

Complainant is the owner of premises on a street in Farrell Borough upon which respondent has a distribution main, and on or about June 1, 1918, applied for service, which was refused. In respondent's answer to the complaint filed, it bases its refusal

upon its inability to secure labor and materials, as well as upon the orders from the United States Fuel Administration, which directed respondent not to make new connections. Respondent also alleges that it has no charter right to serve the public in Farrell Borough. Nothing is said, however, in its answer about its lack of supply.

The cost of making the connection from respondent's mains to the premises of complainant is nominal and respondent at the hearing did not contend that such cost should stand in the way of making the connection, if it were otherwise warranted in rendering service to complainant. Respondent has made connections in Farrell with new patrons since complainant made application to it. Under these circumstances we do not think respondent can or should shield its refusal to serve complainant on account of its want of charter right to serve Farrell Borough. In *Terminal Taxicab Company vs. District of Columbia*, 241 U. S. Supreme Court, 252; P. U. R. 1916 D. 972; wherein the company sought to shield itself from regulation through its alleged want of charter rights to operate in the District, Justice Holmes said: "The plaintiff is a Virginia corporation," and "does business in the District (of Columbia), and the important thing," so far as Commission right to regulate is concerned, "is what it does, not what its charter says."

The orders heretofore issued by the United States Fuel Administration cannot at this time be advanced as the reason for refusing the service, for the grounds upon which they were predicated no longer exist and that body ceased to function and its orders were vacated on May 15, 1919.

At the time of taking the testimony respondent offered evidence indicating that its supply was diminishing and that therefore it should not take on any new consumers. The statement was made that during the severe winter of 1917-18 it was unable to properly serve its patrons, but that during the winter of 1918-19 it had sufficient supply to render its service. The evidence relating to its lack of supply was general in its character and not sufficient to warrant us in dismissing this complaint. That others may apply to respondent for service, if this complaint is sustained, should not control our conclusions. We have before us but the single complaint which, under all the evidence, we think should

be sustained and respondent required to extend its service to complainant within a reasonable time.

The complaint is sustained and an order will issue accordingly.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania, upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof filed of record its report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof:

Now, to-wit, June 3, 1919, the respondent, the United Natural Gas Company, is ordered within thirty days from the date of this order to extend its distribution main to the property of the complainant, Nick Bilusich, and to serve said complainant with natural gas.

By the Commission,
WM. D. B. AINEY, *Chairman.*

ELTON J. BUCKLEY v. THE PENNSYLVANIA RAILROAD CO.

Railroads—Service—Commutation tickets—Good for one calendar month only—Jurisdiction of Commission during Federal control.

The respondent issued sixty-trip commutation tickets good for one month in conformity with a prior order of the Commission. Complaint was made that this arrangement was inequitable on the ground that an excess of transportation was thus provided for the month of February.

The Commission held that the tickets conformed with its order, that the arrangement was equitable, and dismissed the complaint, as in any case it was without jurisdiction during the continuance of Federal control.

COMPLAINT DOCKET No. 2667.

Elton J. Buckley, for complainant.

Henry Wolf Bikle, for respondent.

VOL. VII—39

Report and Order of the Commission.

ALCORN, Commissioner:

On December 12, 1914, in the case of the Combined Committee of the United Business Men's Association of Philadelphia, et al. v. The Pennsylvania Railroad Company (Complaint No. 315), 2 P. C. R. 262, the Commission made an order as follows:

"For the sale of sixty-trip individual commutation tickets and forty-six-trip school individual commutation tickets, each class of tickets valid for a period of one month from the date of issue,"

In pursuance of the said order, the Pennsylvania Railroad Company filed its tariff and schedule of rates and put into effect a monthly sixty-trip ticket valid for one month from the date of issue.

It is complained that such tickets issued during the month of February are allowed only twenty-eight days in which they can be used, and it is alleged that for the tickets purchased in the month of February twenty-eight days is not a reasonable time within which to use a sixty-trip ticket. Tickets issued in the other months of the year are also valid for one month from the date of issue. It follows, therefore, that for seven months the holder of the ticket is given thirty-one days in which to use the sixty trips and for four months, thirty days.

The testimony shows that the price at which the tickets are sold is not based upon the number of trips but is a rate fixed to accommodate the regular commuters. The commuters ordinarily use these tickets during the entire year. It does not appear, therefore, to work any hardship because during one month of the year a less number of days are allowed for the use of the tickets than during the other eleven months. The order of the Commission was that these sixty-trip tickets should be valid for one month from the date of issue. That every month does not contain the same number of days does not affect the reasonableness of the rate. Some standard had to be adopted and a calendar month seemed to be the best. If the ticket should be limited to thirty days, the commuters would not be as much benefited as by the limitation of one calendar month.

The Commission is of the opinion that the sixty-trip ticket as put in use by the respondent is in conformity with the order of the Commission entered December 12, 1914, but even if it were not the railroad is now being operated by the Federal Government and under the decision of the Supreme Court, this Commission does not have jurisdiction over intra-state rates during the period of Federal control. The complaint is therefore dismissed and an order to that effect will be entered.

ORDER.

This matter being before the Public Service Commission of the Commonwealth of Pennsylvania upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having on the date hereof made and filed of record a report containing its findings of fact and conclusions thereon, which said report is hereby approved and made a part hereof :

Now, to-wit, June 17, 1919, It is ordered: That the complaint in this case be and the same is hereby dismissed.

By the Commission,

WM. D. B. AINEY, *Chairman,*

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